Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court Of The United States

TOWN OF MIDDLEBURY, et al.,

Petitioners,

v.

GOODRICH CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Ninth Circuit has held that a factfinder's allocation of response costs under CERCLA § 113(f) is reviewed for abuse of discretion in the selection of equitable factors to apply, and for clear error on the allocation made according to those factors. The Second Circuit rejected that standard of review and upheld the district court's reallocation of response costs, despite a special master's determination that no allocation was appropriate, and without finding that the special master's underlying factual conclusions were erroneous under any standard. Is the standard of review articulated by the Ninth Circuit, and rejected in this case below, applicable to the conclusions of a special master?

2. Does Rule 53(e)(2) of the Federal Rules of Civil Procedure require a hearing before a district court rejects a special master's report finding that no allocation should be imposed under CERCLA § 113(f) and then issues a ruling allocating millions of dollars in response costs to municipalities?

LIST OF PARTIES AND PARTIES TO PROCEEDINGS BELOW

In addition to the party named in the caption, the following parties appeared below and are petitioners here: Town of Hamden, Town of Orange, Town of Seymour, Town of Westport and City of New Haven. In addition to the party named in the caption, the following appeared below and are respondents here: Crompton Manufacturing Co., Reynolds Metal Co., Naugatuck Glass Co., Naugatuck Treatment Co., Cadbury Beverages Inc., Coltec Industries Inc., B.P. Amoco, Risdon Corp., Unisys Corp. and Kerite Co.

The following parties were named below as plaintiffs:

General Electric Company and Subsidiaries; Chase Brass & Copper, Cheesebrough-Pond's, Inc.; E.I. Dupont De Nemours & Co.; Elco Industries, Inc.; Condec Corp., Guilford Gravure, Inc., Hemingway & Bartlett Manufacturing Co.; Humphrey Chemical Co.; Keller & Long, Inc.; Colt Industries; Plastiglide Manufacturing Corp.; Robertshaw Controls Co.; Textron, Inc.; Treadwell Corp.; Ware Chemical Corp.; Waterbury Plating Co.; Philips Medical Systems, Inc.; Upjohn Co.; Dow Corning Corp.; Environmental Waste Resources, Inc.; White Consolidated Industries; Hoechst Celanese Corp.; Ken-Chas Reserve Co.; United States of America; State of Connecticut.

The following were named below as defendant-appellees:

Borough of Naugatuck; John Betkoski; George Clark; Armstrong Rubber Co.; Thomas Ashmore; Bristol

Flowed Gasket Co.; Connecticut Resources Recovery Authority; CRRA, Dee's, Inc.; also known as Dee's Refuse, Inc.; Derby Tire Co.; Eastern Co.; General Roofing & Sheet Metal Co., Inc.; Gerald Metals, Inc.; C.R. Gibson Co.; Hospital Marketing Services Co., Inc.; Ideal Manufacturing Co.; Jacob Brothers, Inc.; Litton Systems, Inc.; also known as Winchester Electronics; Manafort Brothers, Inc.; NASCO, Inc.; New Haven Housing Authority; Northeast Utilities; Perrotti, Frank & Sans, Inc.; Quality Rubber Co.; Sanitary Refuse Co., Inc.; Seymour Brass Truning Co.; Sperry Rand Corp.; Stauffer Chemical Co.; Town of Thomaston; Town of Woodbury Co., Inc.; Watertown Housing Authority Zollo Drum Co., Inc.; Atlantic Richfield Co.; Adam's Service Station; Armand's Auto Service; High Ridge Apartments; Ashmore Trucking; Beacon Outing Club; Brass Rail Restaurant; Coffee Shop; Crelan Constr. Co.; CT. Sheet Metal/Wood Co.; Daddio's; David Rupsis; Edward Betowski; Elk's Lodge #967; George's Floor Covering; Horizon Homes; Korvette Services, Latella Carting Co.; Lombard Bros., Inc.; Long Meadow Café; McDonald's Restaurant; Meyers & Schwartz, Neal's Coffee Shoppe; Nelson Mendes; Portanova Trucking Co., Portuguese Club, Ray's Hardware, Shore's Auto Parts; Steve's Tires, Stop & Shop; Triangle Services; Trowbridge Apartments; Valley Motor Trailer Sales; Valley Mobile Homes Park; Vieira Agency; Waterbury Pressed Metals; Town of Bethany; City of Waterbury; Town of Killingworth; Town of Beacon Falls; Naugatuck Y.M.C.A.; E. Eric Arsan Refuse; John Ashmore; Joseph Betkoski; Connecticut Pharmacare, Inc.; doing business as Ford Pharmacy; First National Supermarkets, Inc.; P. Francini Co.; Jetzon Tire Co.; City of Milford; NRS Carting Co., Inc.; Peter Paul Cadbury; Town of Plymouth; Town of Stratford; Town of Watertown.

The following were named below as defendants:

Harold Murtha; Murtha Enterprises, Inc.; Murtha Waste Control Corp.; Murtha Trucking, Inc.; Beacon Heights, Inc.; Rubber Avenue Enterprises; Clearwater Pools, Inc.; Plume & Atwood Industries, Inc.; Town of Ansonia; CVS; A.C. Hampson Printing Co.; ACCO Industries, Inc.; American Chain & Cable Co., Inc.; ACMAT Corp.; A.M. International, Inc.; A.R. Deburring; Inc.; Aetna Life and Casualty Co.; Albaitis Brothers, Inc.; All Brite Chemical Corp.; American Chemical & Refining Co., Inc.; American Refuse Co.; Ansonia Copper & Brass, Inc.; W.R. Archer & Co.; Ashland Oil, Inc.; Auto-Swage Products, Inc.; B & W Tool, Inc.; Bailey's Express, Inc.; Reliable Warehouse Co.; Charles Batchelder Co., Inc.; Bemore Manufacturing Corp.; Better Formed Metals, Bosco's Automotive Center, Inc.; Buckmiller Brothers Funeral Home, Inc.; CIPCO Manufacturing, Inc.; Call Peter, Inc.; Capeheart Corp.; Carpet Barn, Inc.; Central Manufacturing Co.; Charles Fisher; Chemical Laman Tank Lines, Inc.; City of Shelton; City of Stamford; Cole Screw Machine Products, Inc.; Colonial Tool & Die Co., Inc.; Combustion Equipment Associates, Inc.; Compaction Systems Corp.; Concentric Tool & Manufacturing Co., Inc.; Connecticut Manufacturing Co., Inc.; Cooper Industries, Inc.; Copes Rubbish Removal; Consolidated Rail Corp.; Custom Cables Corp.; Danberg Chemical Co., Inc.; R.T. Delaney Co.; Inc., Diversified Industries; Doval Tool & Manufacturing, Inc.; Frank Elshire; Engineered Sinterings & Plastics, Inc.; Ensign-Bickford Co.; Eyelematic Manufacturing Co.; Fairmont Corp. of CT; Federal Equipment Co.; Ford Instrument Co.; G & R Manufacturing Co.; Inc.; GTE Products Corp.; GEM Manufacturing Co.; Harbor Petroleum Products, Ltd.; Frank Hill; Hill Tool & Manufacturing; Hoff

Manufacturing Co.; Illinois Tool Works; Industrial Disposal Services, Inc.; International Tire Warehouse, Inc.; J & K Electric Co., Inc.; John P. Cleary; W.A. Krueger Co.; Leader Oil Co., Inc.; Maho Machine Tool Corp.; MIR, Inc.; Magic Maintenance, Inc.; Naugatuck Daily News, New Haven Copper Co.; Nu-Tech Precision Metals, Inc.; Nutmeg Builders, Inc.; Oxford General Industries, Inc.; Frank Perrotti & Sons, Inc.; Prime Screw Machine Products, Inc.; Puritan Marine Flotation, Inc.; Quantum, Inc.; Quantum Chemical Corp.; Revere Corporation of America; Rondo of America, Inc.; SCR Electric, Inc.; Sanitas, Inc.; Schiavone Corp.; Schick Companies, Inc.; Scovill, Inc.; Sealectro Corp.; Sheehy & Sons, Inc.; Speedmaster Corp.; Sperry Corp.; Steven J. Jacksis; Robert Johnson; Super Retread Tire Co.; B. Swirsky & Co., Inc.; TRW, Inc.; Thinsheet Metals Co.; Time-Mist, Inc.; Tire Shak, Inc.; Town Fair Tire Centers, Inc.; Town of Southbury; Union Carbide Corp.; United States Army; Department of Defense, Washington, D.C.; U.S. Navy; United States Postal Service; Vermont American Corp.; Virginia Industries, Inc.; WPM, Inc.; Waltec American Floorings, Inc.; Waterbury Buckle Co.; Waterbury Rolling Mills; American Cyanamid Co.; Bristol Socket Screw Co.; Colt Ind. Operating Corp.; Connecticut Paper Corp.; GTE Products of Connecticut Corp.; Kennecott Mining Corp.; Monsanto Co.; Pfizer, Inc.; Scovill Manufacturing Corp.; Remington Technology, Inc.; AW Sandora & Sons; Action Refuse; Action Moving Co.; Adley Express Co.; Al Corsino; Al Griffiths; American Auto Parts; American Roofing Co.; American Thread; Amodeo's Market; Anderson Auto Electric; Ann Sawicki; Annelli Construction Co.; Ansonia Steel Fabrication; Anthony Julian Construction; Art Conn Building, Apollo Co.; Avenue Glass & Aluminum; Harold Wheeler; Beacon Auto Wrecking; Beacon Luncheonette; Bethany Tree Service; Bill Marino; Bob Markovic; Bob The Builder; Borghesi Construction Breen's; Bridgeport Brass

(Quantum Chem); Bristol Co.; Bruce Lacharity; A.M. Bruning Div.; Bunker Hill Market; Buskey Tires, Highland Homestead; Carl G. Peterson, Inc.; Carolyn's Ice Cream; Carvel Ice Cream; Celantano Properties; Century Tire Co.; Charles Bruning; Charlie Woodland; Chris's Gift Shop; Christopher Columbo; Clancey's Remodeling; Clarence Bowley; Colonial Bank; Connecticut Water Co.; Connecticut Waste Processing; Consolidated Lithograph; Continental Catering Service; Cotton Hollow Condo; Cowles Co.; Crelan Construction Co.; Cumberland Farms, Inc.; Dauria Enterprises; Dean's Restaurant; Del Glass Co.; Derby Hospital; Derby Oil Corp.; Dex Co.; Discount Furniture; Doctor's Assoc.; Donald House; Donovan's Pharmacy; Double A Meat Packing; E.R. Smith, Inc.; Eastern Freightways; Eastern Association; Inc.; Edgar R. Citvello; Edward Rostowsky; Elmer Rob Illard; Endeavor Dev. Corp.; Hobby Shop; F. Perrotti & Sons; Family Shoe Center; Farer Transportation; Fassett's Farm; Fernando Preta; Flex-Van Truck Rental; FNS-Naugatuck; Ford's Drug Store; Fortin's Restaurant; Freddy's Diner; Friction Material's Co.; G & L Excavating, Inc.; Garafola & Sons, Inc.; Gary Brown Roofing; Gasland Services Station; General Reinsurance Corp.; Home Market; Gerald Noonan; Good Hope Industries, Inc.; Goodyear Truck Tire; Gordon Plumbing; GTE/Sylvania; Guggenheim International; H. Chamberlain & Son; H.V. Simpson; Hamden Telephone Handy Stop Food Shop; Hickory Builders; Housatonic Lodge; Howard Johnson Hotel; Howard Packer; Indian Rock Realty Co.; Interstate Industrial; Irene's Variety Store; Jack Stanczyk, Inc.; James W. Melborne; Jeff Lima; John Macinone; Johnson Sheet Metal; Johnson's Refuse Service; Jones Nursing Home; Junion Screw Machine; Kalart Victor; Kem-Blo Corp.; King's Dept. Store; Laticrete Co.; L.H. Racke, Inc.; Lachallet-Millat; Litton-Winchester; Long Hill Lumber; M & M Transportation; M & J Trucking Co.; M.J. Papa Assoc.;

Marjan, Inc.; Marmal Finishers; Marshall McCann; Massimo Trucking; MGM Treads; Mattatuck Manor Apartment; Maxies; Michael Schiavone; Michael's Carpet, Inc.; Micro-Etch Products; O.F. Morsbug & Sons; Mountainview Plaza Coffee Shop; Mountainview Laundramat; Mrs. Matthew Scully; Nancy Robinski; Naugatuck Hardware; Naugatuck Farmer's Market; Neelco, Inc.; Neil Hennessey; New England Masonry; New England Aircraft; New Britain Machine; Nite Life Lunge; Norwalk Refuse Service; Nutmeg Baker's Supply; O'Toole's Pharmacy; Old Coroner Café; Papparazzo Management Co.; Park City Builders; Parva Buckle Co., Inc.; Patterson Tire/Oil Co.; Pepperidge Tree Shop; Phil's Restaurant; Plastic Sciences; Pond Hill Pet Salon; Prospect Manor Apartments; Quality Sheet Metal; R.A. Civitello & Co.; Rafferty & Brown; Ray Alder, Inc.; Ray's Grocery Store; Raybestos Manhattan; Reliable Industrial Waste Disposal Res-Land, Inc.; Rhea Carpet; Richard Foley; Richard's Carpet; Rick's Service Center; Rita's Bakery; Robert's Construction Co.; Roosties; Root & Boyd; Rose Hurst Dairy; Rossi Shoe Store; Roy Yoland; Ruth Borgnis; S. Anderson Construction; S.P. Skinner Co., Inc.; Sargent & Co.; Savelle Ford, Inc.; Seal Manufacturing; Sears Roebuck & Co.; Sikorski/Shore-Line Tires; Southern New England Theatres; Southwood Apartments; Sperry Automatics; Sponge Rubber Prod.; St. Francis Church; Stamford Refuse Co.; State National Bank; Stephen E. Brosius; Steve Repko; Sugar Loaf Baker; Summit Chem. Co.; Super Print; Techni-Chem; Tee Jay Manufacturing; Texaco Service Station; Thrifty Market; Tocco's Restaurant; Tom Owens; Tom Mott; Total Music Store; Traver Electric Motor; Tribuny Tennis; Turbo Products; Valley View Construction; W.J. Megan, Inc., Walt's Liquor Store; Waterbury Truck Service; Waterbury Sand & Gravel; Waterbury Auto Works; West Hill Apartments; Whelan's Drug Store; Whip-It Tire Co.; Whitman's Carpet Co.; Widder Corp.; Wigglesworth, Inc.;

Wilshire Industry; Yale's, Inc.; Zicon Corp.; Ziggie Kobylenski; Zimmerman Refuse; Terrence Murtha; Laurel Park, Inc.; Lea Manufacturing, Co.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Towns of Middlebury, Hamden, Orange, Seymour and Westport and the City of New Haven, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit at issue (Pet. App. 1a-40a) is reported at 311 F.3d 154. The orders of the district court ruling on the report of the special master and the objections thereto and ruling on the motions for reconsideration (Pet. App. 41a-91a) are unpublished.

JURISDICTION

The Second Circuit's opinion was entered on October 29, 2002. A timely petition for rehearing en banc (Pet. App. 129a) was denied on January 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1). The plaintiffs' complaint alleged jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 9601, 9613.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-75, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986)

and Federal Rule of Civil Procedure 53 are reproduced in the appendix (134a-141a).

STATEMENT OF THE CASE

The respondents commenced this action against the petitioners and others in an effort to recoup response costs they incurred for remediation, pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f). They alleged jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. §§ 9601, 9613. Section 113(f) permits a private party who is responsible for the cost of remediating a "Superfund" site to seek contribution from other potentially responsible parties. In this case, following a six month trial, a special master appointed under Fed. R. Civ. P. 53 concluded that no response costs should be allocated to the six petitioner municipalities. The district court, without specifying any standard of review, rejected the special master's conclusion and, without conducting a hearing, allocated approximately $5.5 million to the municipalities, whose sole contribution to the landfills was municipal solid waste ("MSW"). The Second Circuit upheld that decision, creating a conflict within the circuits on the applicable standard of review and establishing new precedent on the requirement of a hearing under Fed. R. Civ. P. 53.

1. Beginning in the 1940s and proceeding through the 1980s, two Connecticut landfills, named Beacon Heights and Laurel Park, accepted industrial waste, e.g., liquid chemical wastes, deposited by industrial and commercial entities, and accepted MSW deposited by several Connecticut municipalities, including the petitioners. Subsequently, the Environmental Protection Agency

("EPA") designated the landfills as Superfund sites on the National Priority List under CERCLA.

The EPA then began identifying parties that it believed were responsible for causing the conditions existing at each landfill, pursuant to CERCLA § 107, 42 U.S.C. § 9607. Among others, it identified Terrance and Harold Murtha, and several corporations controlled by them (collectively, the "Murthas"), who owned and operated Laurel Park from 1961 until 1987 and owned and operated Beacon Heights from 1970 to 1987. The EPA also identified several companies that had dumped waste at the landfills as potentially responsible parties ("PRPs").

Two coalitions comprised of corporate polluters, the Beacon Heights Coalition ("BHC") and the Laurel Park Coalition ("LPC"), eventually emerged and entered into separate consent decrees with the EPA. Under the consent decrees, the coalitions agreed to remediate the environmental conditions at each of the landfills.

The Murthas settled the claims brought against them by the United States, the State of Connecticut and the BHC, and assigned to the BHC any contribution claims they had against other third-party defendants. Although the LPC had not been formed when the consent decree with the Murthas was negotiated, the parties agreed that should an industrial coalition form within eighteen months of the entry of the Murthas' consent decree, the coalition would receive a portion of the funds for the remediation of Laurel Park. The LPC was formed within the time period and received the allotted funds.

Thereafter, the BHC and the LPC pursued claims against hundreds of third-party defendants, including the petitioners, seeking contribution toward the cost of the cleanup, pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f). The coalitions' contribution claims against the petitioners are based on the presence of hazardous substances, as constituent parts of consumer and industrial products, that is found in the MSW waste stream.

2. After the coalitions had settled their claims against a large number of the third-party defendants, the district court referred the coalitions' contribution claims against the petitioners and other third-party defendants to a special master. The referral was first for the purpose of mediation and, then, if necessary, an evidentiary hearing. Upon the conclusion of a hearing, the special master was to file a report pursuant to Fed. R. Civ. P. 53(e).

The July 21, 1997 Order of Reference charged the special master with "finding facts, drawing conclusions and recommending what, if any, contribution the involved Third-Party Defendant, or potentially responsible party, should be required to make under CERCLA as it has been interpreted by the Second Circuit Court of Appeals." The Order of Reference also required the special master's report to "recite the factors on which a recommended equitable allocation of the remediation cost as to a Third Party Defendant or potentially responsible party is based." Anticipating potential objections to the report, the Order of Reference provided that, "Any objection will be decided de novo on the legal issues ... Any factual objection will be decided on whether the finding or recommendation is clearly erroneous."

After the special master's mediation efforts, approximately forty third-party defendants remained in the contribution action, including the petitioners. In proceeding to the merits of the coalitions' contribution claims, the special master held an evidentiary hearing over a six-month period. During this time, 41 witnesses testified and over 500 evidentiary exhibits were introduced.

After the parties submitted their proposed findings of fact, the special master filed his report on March 1, 1999. In sum, based on the equitable factors he identified, the special master recommended that the district court allocate no remediation costs to the municipal defendants.

In response to the special master's report, the coalitions submitted extensive objections. The municipal defendants filed submissions urging the district court to adopt the report with minor modifications.

3. On September 28, 1999, the district court issued its ruling (Pet. App. 41a) on the parties' objections to the report ("First Ruling"). The district court later amended certain of its findings on April 13, 2000 in response to the parties' motions for reconsideration ("Second Ruling").

a. In its First Ruling, the district court made independent factual findings, reviewed the equitable factors selected by the special master, approving nearly all of them, and reviewed the special master's findings rejecting very few of them. Then, relying on its own independent factual findings and an independently established set of equitable factors, the court proceeded to reach its own conclusions and derive its own allocation.

The district court first reviewed the history of each landfill and independently found facts relating to the volume of waste each municipal defendant disposed of at each landfill, accepting in large part the volume amounts suggested by the coalitions. The court also established for itself the amounts and types of wastes sent by the coalitions. Within the district court's recitation of these facts, it did accept those findings of the special master relating to the quality of the BHC and LPC's waste streams as industrial, highly toxic, releasable and mobile, particularly in its liquid form. It also accepted the findings that the coalition member's waste at each site had an adverse affect on leachate quality. Assessing evidence concerning the relative presence of hazardous substances in the municipal defendants' MSW, the district court accepted the special master's findings that: (1) a typical town's MSW will not necessarily comport to the general national profile relied upon exclusively by the coalitions; (2) the record reflected, at most, that the concentration of hazardous substances in MSW is between 0.1% to 0.4%; (3) that comparison of this amount to the hazardous substances found in the coalition's waste was an properly considered equitable factor; and (4) that any response costs attributable to the municipalities could be considered a lesser included cost in the total cost necessary to correct the coalitions' contamination.

After reviewing the special master's findings and making its own new findings, the district court proceeded to reject the report's recommended allocation, without explaining why it was "clearly erroneous." While recognizing that the special master declined to credit the expert testimony presented by the coalitions, the court

merely stated that the municipal defendants' "experts' evidence suggests that some allocation was appropriate." The district court then set forth a list of equitable factors it thought should apply in allocating the parties' contribution shares. Among other factors, the district court considered: (1) the total volume of waste deposited; (2) the portion of the waste constituting hazardous substances; (3) the form of the hazardous substances - i.e., liquid or solid; (4) whether it was deposited in free form or as a constituent part of a product or substance; (5) the releaseability (decomposition) of the hazardous substances; (6) the mobility of the hazardous substances in each party's waste; (7) whether the hazardous substance required leachate treatment; and (8) the comparative impact of MSW and industrial waste on leachate quality.

After making further independent findings of fact on the cost of remediation, the district court proceeded to make its own allocation of costs without explaining what was wrong with the special master's finding that no allocation should be made. All told, it calculated BHC's recoverable response costs as $40,664,785.77 and LPC's recoverable response costs as $13,865,428.91. The district court then subtracted from these figures the total settlement proceeds the coalitions previously received from other third-party defendants. The resulting totals - $33,446,500 for BHC and $7,069,541 for LPC (after adjusting for the Naugatuck credit) - were the amounts against which the municipal defendants' percentage contribution shares were assessed.

To determine each municipal defendant's contribution share of the costs, the district court fashioned an allocation model of its own creation and settled on four

factors, which incorporated: (1) the combined total volume of waste deposited by the coalitions and municipal defendants at the respective landfills; (2) the volume of MSW from each municipality; (3) a toxicity factor for each coalition's liquid and industrial waste as contrasted with its members' and each municipal defendant's MSW and (4) a discount factor for two municipalities based on a prior settlement by their waste transporter. Applying this formula, the district court in its First Ruling allocated contribution shares among the petitioning municipal defendants as follows:

- For response costs incurred by the LPC: (1) Orange - 3.63%; (2) Seymour - 3.1%; and (3) Middlebury - 4.8%.

- For response costs incurred by the BHC: (1) Orange - 2.26%; (2) Seymour - 1.52%; (3) Westport - 6.51%; (4) Hamden - 0.27%; and (5) New Haven - 0.45%.

- The district court also allocated a 1.1% share to Naugatuck at Beacon Heights, but held, as an equitable factor, that its contribution payment would be offset by $325,000 to reflect a settlement payment the Naugatuck Treatment Company ("NTC") made to the BHC using funds that belonged to Naugatuck.

b. In its Second Ruling, the district court denied the petitioners' request for a hearing on the allocation of response costs. It did not believe that it had to review the evidence firsthand. Instead, the district court stated that the special master's role had been to simply create the record. It characterized its own role as looking "to the

existence in the record of substantiation of findings recommended by the SM. If not substantiated, based on the record created before the SM the court makes its own findings."

As part of its Second Ruling, the district court granted the coalitions' request for pre-judgment interest, addressed additional cost arguments and corrected errors from the First Ruling. The court rejected the coalitions' request for compound interest, opting instead to apply simple interest.

c. On August 2, 2000, the district court entered an order (Pet. App. 119a-120a) again revising its cost estimates and entering its final judgment. On the BHC's contribution claims, the court awarded the following amounts and percentage of liability, inclusive of pre-judgment interest: (1) Middlebury -- $186,779.94 (.45%); (2) Westport -- $2,702,083.23 (6.51%); (2) New Haven -- $186,779.94 (.45%); (4) Orange -- $938,050.39 (.27%); (5) Seymour -- $630,901.16 (1.52%); (6) Hamden $112,067.97 (2.26%) and (7) Naugatuck -- $46,933.87. The court awarded the LPC the following amounts, inclusive of pre-judgment interest: (1) Orange -- $239,471.69 (3.63%); (2) Seymour -- $204,507.50 (3.1%); and (3) Middlebury -- $316,656.78 (4.8%). Later, the district court amended its judgment regarding the LPC's claims to include a declaratory judgment establishing the municipal defendants' liability for LPC's future response costs. (Pet. App. 119a-120a)

4. The petitioners appealed the district court's rulings. In sum, they argued they should not be required to contribute any share of the response costs, as the special master had concluded. They also maintained that the

district court erred by failing to hold a hearing prior to ruling on the coalitions' objections to the special master's report.[1]

5. The Second Circuit issued an opinion affirming the district court in relevant part on October 29, 2002. It began its analysis by addressing the standard of review, which it found to be "determinative" of the case. It held that the district court's rulings were entitled to the deferential standard of abuse of discretion. The court made four relevant findings in rejecting the petitioners' arguments to the contrary.

a. First, the Second Circuit held that the clause in the Order of Reference establishing the standard that the district court would apply when it reviewed the special master's report did not govern. The Order of Reference stated that "[a]ny factual objection will be decided on whether the finding or recommendation is clearly erroneous based on the record before the special master." The Second Circuit held that this clause did not bind the district court to the special master's recommended equitable factors and allocation of response costs, subject to the court's deferential review. Instead, based on a different section of the Order of Reference discussing the

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[1] The LPC appealed from the district court's denial of its claim to certain response costs and the court's interest awards. The BHC appealed, asserting that the district court erred by allowing Naugatuck to offset its contribution share.

mediation stage of the litigation,[2] and the special master's statements during the hearing, the Second Circuit concluded that the district court had reserved to itself the power to allocate response costs among the parties according to the equitable factors found appropriate by it and not by the special master.

b. Second, the Second Circuit rejected the petitioners' argument that the allocation of liability under CERCLA § 113(f) is a question of fact, and that the court of appeals had to review the special master's recommended allocation directly, for clear error. The court acknowledged that it had to review the special master's factual findings for clear error, whether or not the district court accepted them. It held, however, that the allocation of response costs under § 113(f) was not a question of fact. Instead, it held that the allocation was an "equitable determination based on the district court's discretionary selection of the appropriate equitable factors in a given case."

c. Third, the Second Circuit also refused to ignore the district court's allocation of response costs and, instead, directly review the special master's recommended allocation for abuse of discretion.

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[2] The section of the Order of Reference that the Second Circuit relied on stated that "the success of mediation depends on the acknowledgment by each party that the decision after a hearing cannot be predicted. That uncertainty arises from the 'equitable factors' to be applied by the court as 'appropriate' in accordance with CERCLA § 113(f)."

d. Finally, the Second Circuit rejected the petitioners' argument that the district court had to accept the special master's recommended allocation absent a determination that the master had abused his discretion. Instead, the court held that a district court need only give "some deference" to a special master's recommendation even where the special master has "'direct and extensive'" knowledge about the particular circumstances of a given case.

e. Turning to the merits of the petitioners' claims, the Second Circuit held that the district court gave due deference to the special master's recommendation and did not abuse its discretion in allocating contribution shares among the municipal defendants. To the extent that the district court supplemented the factors suggested by the special master or, conversely, did not apply factors recommended by the special master, the Second Circuit found that the district court had acted within its discretion.

In addressing the district court's allocation analysis, the Second Circuit rejected the petitioners' claim that the district court erred by supplementing the special master's findings. Specifically, the court rejected the petitioners' argument that the district court was not in a position to make independent findings of fact. It maintained that this argument was contrary to Fed. R. Civ. P. 53(e)(2), which permits a district court to "modify" a special master's report. In sum, the Second Circuit concluded that the district court gave enough deference to the special master's report and did not abuse its discretion in allocating contribution shares to the municipal defendants.

f. The Second Circuit also rejected the petitioners' argument that under Fed. R. Civ. P. 53(e)(2) a hearing is mandatory and that the district court should not have ruled as it did on the special master's report without holding a hearing. It concluded that even if the plain language of Rule 53(e)(2) entitles an objecting party to a hearing, the petitioners had no right to a hearing because they had not objected to the special master's report. Moreover, the court held that the petitioners waived any right to a hearing by failing to request a hearing on the special master's report.

g. Based on its analysis, the Second Circuit affirmed the district court's decision insofar as it allocated shares of the coalitions' response costs to the municipal defendants but vacated the district court's award of pre-judgment and post-judgment interest regarding the LPC's claims and award of a lump-sum for the BHC's future recovery costs.

6. Subsequently, the petitioners filed a timely petition for rehearing en banc. It was denied on January 10, 2003.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for two reasons:

I. Certiorari Is Warranted To Resolve The Split In The Circuits Regarding The Standard For Reviewing The Application Of Equitable Factors To Allocate Response Costs Under CERCLA Section 113(f)

CERCLA § 113(f) provides that "[a]ny person may seek contribution from any other person who is liable or

potentially liable under [42 U.S.C.] § 9607 .... In resolving contribution claims, CERCLA § 113(f) directs courts to allocate cleanup costs between responsible parties "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Thus, the statute employs a two-part inquiry. First, the court must determine whether the defendant is "liable" under CERCLA § 107(a). Second, the court must allocate response costs among liable parties in an equitable manner. *See United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991). CERCLA § 113(f) does not limit a court to any particular set of factors. Instead, the courts have discretion to select factors appropriate to the particular facts of a case. *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998); *Environmental Transp. Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992). *See also Tosco Corp. v. Koch Industries, Inc.*, 216 F.3d 886, 894 (10th Cir. 2000). In this case, the district court delegated the allocation task to a special master pursuant to Fed. R. Civ. P. 53.

Generally speaking, in cases where a special master is employed, the special master's legal conclusions are reviewed *de novo*. *Gottlieb v. Barry*, 43 F.3d 474, 486 (10th Cir. 1994). The special master's factual findings "shall" be accepted unless they are clearly erroneous. *Id.*; Fed. R. Civ. P. 53(e). *See Morris Plan Indus. Bank v. Henderson*, 131 F.2d 975, 976-77 (2d Cir. 1942)(L. Hand, J.). Where the district court rejects a factual finding by a special master, a majority of the courts of appeal have held that that they must "directly review the findings of the special master, thereby effectively ignoring the district's court review of the master's findings." *Gottlieb*, 43 F.3d at 486-87 (citing cases).

In the instant case, following a six month trial, the special master identified the equitable factors that ought to apply and applied them to the facts as he found them, concluding that there should be no allocation of response costs to the petitioners. Upon reviewing the special master's conclusion, the district court did not hold that the factors chosen or the facts found were erroneous under any standard. Nevertheless, after identifying additional equitable factors and making additional factual findings, the district court rejected the special master's report and allocated millions of dollars in response costs to the petitioners.

The Second Circuit acknowledged that the question of what standard of review governed was a "hotly debated" issue between the parties that was "determinative" of the case. The Second Circuit then decided to review the district court's treatment of the special master's report under an abuse of discretion standard. Consequently, the Second Circuit did not directly review the special master's conclusions. Nor did it find that the special master's identification of equitable factors, findings of fact or application of the factors was erroneous under any standard. Instead, it affirmed the district court's ruling based on the conclusion that the district court needed only to give the special master's report "some deference" and that its allocation of contribution shares to the petitioners was not an abuse of discretion.

In affirming the district court, the Second Circuit held that the allocation of response costs under CERCLA § 113(f) is not a question of fact. Rather, it held that the

allocation was "an equitable determination based on the district court's discretionary selection of the appropriate equitable factors in a given case." In reaching this conclusion, the Second Circuit found the Ninth Circuit's *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177 (9th Cir. 2000) opinion on this issue, to be "unpersuasive." *Boeing* held that while the fact finder's choice of equitable factors is reviewed for an abuse of discretion, its "allocation according to those factors" is reviewed for clear error. 207 F.3d at 1188. The Second Circuit rejected the standard of review established by *Boeing* because the two cases that it cited, *United States v. Alcan Aluminum*, 990 F.2d 711 (2d Cir. 1993) and *In re Bell Petroleum Servs., Inc. (EPA v. Sequa Corp.)*, 3 F.3d 889 (5th Cir. 1993), were CERCLA § 107 cases. It concluded that unlike allocation under § 113(f), § 107's "`divisibility of harm inquiry ... is guided not by equity ... but by principles of causation alone.'" (Pet. App. at 23a quoting *United States v. Hercules*, 247 F.3d 706, 718 (8th Cir. 2001)).

The Second Circuit should have applied the standards of review articulated by the Ninth Circuit in *Boeing* to the special master's report. Like this case, *Boeing* was a CERCLA § 113(f) case. In it, an airplane parts manufacturer sued a nearby landowner for contribution for costs involved in cleanup of a contaminated aquifer. Following a bench trial, the district court allocated past and future costs. On appeal, the Ninth circuit recognized that § 113(f) gives district courts discretion "to decide what factors ought to be considered, as well as the duty to allocate costs according to those factors." *Boeing*, 207 F.3d at 1187. It held that reversal was appropriate "only for an abuse of discretion [in] select[ing] factors or for clear error

in the allocation according to those factors." *Id.* (footnotes omitted).

Applying this standard, the Ninth Circuit concluded that the district court's selection of volume as the primary or exclusive basis for allocation was within its discretion. *Id.* at 1188. It also held that the district court's allocation of seventy percent liability to the landowner and thirty percent to the manufacturer, i.e. the application of the equitable factors, was not clearly erroneous. *Id.* Specifically, it recognized that "`[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.'" *Id.* (footnote omitted). Thus, merely because the testimony before the fact finder could support a different conclusion did not make the application of the factors clearly erroneous. *Id*

The First Circuit took the same approach in *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999). *Acushnet* was also a CERCLA § 113(f) case. In it, potentially responsible parties ("PRPs") who entered into a consent decree with the EPA regarding the cleanup of a landfill brought an action seeking contribution from PRPs who were not targeted by the EPA . The district court granted summary judgment for one defendant. Upon the completion of the plaintiffs' case-in-chief, the district court granted a motion for judgment for the other defendants.

On appeal, the First Circuit affirmed, finding that "the record was insufficient to permit meaningful equitable allocation of remediation costs against any of the defendants under § 9613(f)." *Acushnet*, 191 F.3d at 72. As part of its analysis, the First Circuit recognized that the "standard for [§ 113(f)] contribution liability is the same as

that under § 9607(a) [§ 107]." *Id.* at 75. Moreover, it rejected the plaintiff's argument that causation is irrelevant to the contribution analysis. *Id.* at 79. To the contrary, it acknowledged that "[q]uestions of causation and appropriate allocation of response costs involve quintessential issues of facts." *Id.* *See Quenzer v. United States (In re Quenzer)*, 19 F.3d 163, 165 (5th Cir. 1993)("equitable considerations are largely fact driven."). Although the First Circuit affirmed the district court's judgment as a matter of law, it noted that had the district court made actual allocations under § 113(f), "his equitable determinations would not have been overturned unless he abused his discretion in some fashion, and any underlying findings of fact would be subject to clear error." *Acushnet*, 191 F.3d at 80 n.10.

In the case at bar, the special master was the fact finder charged with the duty of identifying the appropriate equitable factors and applying those factors to the facts found after an evidentiary hearing. The district court delegated this authority to the special master via the Order of Reference. Upon the issuance of the special master's report, the district court assumed a role analogous to that of an appellate court. Under either *Boeing* or *Acushnet* and Rule 53(e)(2), absent a finding that the special master's selection of factors or application of the factors was somehow erroneous, the district court was obliged to adopt the special master's determination that there should be no allocation of any response costs to the petitioners. Given the different approaches employed by the Second Circuit on the one hand and the Ninth and First Circuits on the other hand, the Court should review the Second Circuit's opinion in order to resolve the split between the circuits.

Review is also appropriate because of the nature of the cases affected by the split in authority. CERCLA cases are complex and involve significant liability. They satisfy the "exceptional" class of cases for which special masters are properly employed. Under the standard adopted by the Second Circuit, the use of a special master in a CERCLA case improperly separates the decision-making and fact-finding processes. This Court can resolve the conflict between these approaches and ensure the utility and integrity of the use of special masters in CERCLA cases by granting this petition.

The Second Circuit should have held that the district court abused its discretion by engaging in independent factfinding, substituting its view of the significant equitable factors for that of the special master and by thereafter allocating contribution shares to the petitioners. Neither the Second Circuit nor the district court ever concluded that the special master's application of the equitable factors he identified constituted error under any standard. Rather, the district court substituted its own opinion and engaged in independent fact finding.

Absent a finding that the special master's selection or application of the equitable factors was erroneous, the district court could not reject the special master's findings. Even if the district court had concluded that the special master abused his discretion in the selection of equitable factors to apply, a conclusion the district court also never reached, the application of any new equitable factors had to be done by the special master as part of a remand. Alternatively, the district court could have ordered a new hearing before itself or another trier of fact. The district

court's chosen course, eschewing the application of an appropriate standard of review and substituting its decision for that of the trier, an approach now countenanced by the Second Circuit, is untenable.

II. Certiorari Is Warranted To Review The Second Circuit's Holding That Rule 53(e)(2)'s Plain Language Does Not Require A Hearing To Be Held Before A District Court Accepts, Modifies Or Rejects A Special Master's Report

Rule 53(e)(2) of the Federal Rules of Civil Procedure provides as follows:

> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court ***after hearing*** may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(emphasis added).

It is well-established that under Rule 53(e)(2), a party who objects to a special master's report is entitled to a hearing before the district court adopts the report. *Kieffer v. Sears, Roebuck & Co.*, 873 F.2d 954, 955 (6th Cir. 1989); *In*

re Chicago Milwaukee, St. Paul & Pacific R.R. Co., 739 F.2d 1169, 1171 (7th Cir. 1984); *Livas v. Teledyne Movible Offshore, Inc.*, 607 F.2d 118, 119 (5th Cir. 1979)(per curiam); *In re Wonderbowl*, 424 F.2d 178, 180 (9th Cir. 1970). *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Civil 2d*, § 2612 at 692 (1995 & Supp. 2002). The issues of : (1) whether a non-objecting party has a right to a hearing before the district court rejects a special master's report; and (2) assuming such a right exists, whether the non-objecting party waives the right unless it moves for a hearing, are issues of first impression.

In the instant case, the special master filed his report on March 2, 1999. Without holding a hearing, the district court issued its ruling on the special master's report on September 28, 1999 and rejected the special master's conclusion that the petitioners not be held liable for any response costs. The district court then found the petitioners liable for millions of dollars. The petitioners filed a motion to alter and amend and requested a hearing. The district court denied the petitioners' motion in a ruling filed on April 13, 2000.

On appeal, the Second Circuit rejected the petitioners' argument that the plain language of Rule 53(e)(2) mandated that the district court hold a hearing before ruling on the special master's report. It acknowledged that the Sixth, Seventh and Ninth Circuits had recognized that a party objecting to a report has a right to a hearing and assumed for the sake of its analysis that their holdings were correct. (Pet. App. 38a-39a) Nevertheless, the Second Circuit concluded that the petitioners had not objected to the report and had no right to a hearing on the coalitions' objections. (*Id.* 40a) Moreover, it held that by not moving for a hearing on the

special master's report, the petitioners waived any right they may have had. (*Id.*)

Contrary to the Second Circuit's holding, the plain language of Rule 53(e)(2) requires that a hearing be held before a special master's report is adopted, modified or rejected. The requirement is mandatory. It is not limited to circumstances where a party requests a hearing. The hearing requirement gives the party against whom a judgment is to be entered an opportunity to press its serious arguments to the court. *See Kieffer*, 873 F.2d at 956. The denial of a hearing is "inconsistent with substantial justice and therefore, [i]s not harmless error." *Id.*

In interpreting rules and statutes, it has long been established "that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879). Moreover, "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. German*, 503 U.S. 249, 253 (1992). Thus, the plain reading of the "after hearing" language in Rule 53(e)(2) supports the conclusion that a hearing is required in all cases.

The language of Rule 53(e)(2) does not require a party who prevails before the special master to either object or move for a hearing before the district court. Nor should this be the accepted practice under the rule. The better practice and the practice consistent with the rule's plain language is to require a hearing by the district court before it adopts, modifies or rejects a special master's report. *Accord Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368, 1371 (11th Cir. 1999)(district court held hearing if either party objected). Accordingly, the Second Circuit erred (Pet. App. 38a-40a) when it held that

the petitioners waived any right to a hearing by not filing a motion for a hearing. *See Livas*, 607 F.2d at 119.

Moreover, due process requires that notice and an opportunity to be heard at a meaningful time and in a meaningful manner be afforded before there is a deprivation of property or liberty. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990). The Second Circuit's conclusion that the petitioners waived their right to a hearing is inconsistent with due process and fundamental fairness. It ignores the undisputed fact that one of the petitioners, the Town of Seymour, requested oral argument in connection with its motion to adopt and overlooks the fact that all of the petitioners requested a hearing in connection with their motion for reconsideration.

Review is warranted to establish the appropriate procedure under Rule 53(e)(2). Review is further warranted by the likely impact of the procedure condoned by the Second Circuit. Under such a procedure, a party that prevails before a special master in a large, complex case can have its successful result taken away and suffer the imposition of millions of dollars in liability without any opportunity to be heard by the district court. Such a result requires review and reversal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: April 8, 2003

Respectfully submitted,

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No. _____

In The

Supreme Court Of The United States

TOWN OF MIDDLEBURY, et al.,

Petitioners,

v.

GOODRICH CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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United States Court of Appeals,
Second Circuit.

August Term, 2001

(Argued: April 12, 2002 Decided: Oct. 29, 2002.)

Docket Nos. 01-6014, 01-6016, 01-6018.

GOODRICH CORP. (f/k/a B.F. GOODRICH CO.), CROMPTON MANUFACTURING CO. (f/k/a UNIROYAL CHEMICAL CO., INC.), REYNOLDS METAL CO. (f/k/a REYNOLDS ALUMINUM BUILDING PRODUCTS CO.), NAUGATUCK GLASS CO., NAUGATUCK TREATMENT CO., CADBURY BEVERAGES, INC., COLTEC INDUSTRIES, INC., B.P. AMOCO (f/k/a KEN CHAS RESERVE CO.), RISDON CORP., UNISYS CORP., AND KERITE CO.,

Plaintiffs-Appellants-Cross-Appellees,

- v. -

TOWN OF MIDDLEBURY, TOWN OF HAMDEN, TOWN OF ORANGE, TOWN OF SEYMOUR, TOWN OF WESTPORT, CITY OF NEW HAVEN,

Defendants-Appellees-Cross-Appellants,

BOROUGH OF NAUGATUCK,

Defendant-Appellee.

Before: McLAUGHLIN, POOLER and, B.D. PARKER, Jr., Circuit Judges.

Two corporate coalitions appeal and several Connecticut municpalites cross-appeal from an order of contribution issued by the United States District Court for the District of Connecticut (Doresey, J.) allocating among various polluters, including several municipalities, response costs for environmental damage at two Connecticut landfills, pursuant to 42 U.S.C. § 9613 (f). AFFIRMED in part, VACATED and REMANDED in part.

DAVID E. ROSENGREN, Pepe & Hazard LLP, Hartford, CT, for Plaintiffs-Appellants-Cross-Appellees Goodrich Corp., Crompton Manufacturing Co., Inc. and Reynolds Metal Co.

CHRISTOPHER P. McCORMACK, Tyler Cooper & Alcorn, LLP, New Haven, CT (Robert W. Allen, Robert B. Flynn, Timothy P. Jensen, Matthew A. Sokol, on the brief), for Plaintiffs-Appellants Members of the Laurel Park Coalition.

ANN CATINO, Halloran & Sage LLP, Hartford, Connecticut (Lori D. DiBella and John C. Huggins, Halloran & Sage LLP, Hartford Connecticut, and Nicholas J. Harding, Kosloff & Harding, West Hartford Connecticut, on the brief), for Defendants-Appellees-Cross-Appellants the Towns of Hamden, Middlebury, Orange, Seymour and Westport and the City of New Haven.

KEVIN MCSHERRY, McSherry Law Office, Naugatuck, CT, for Defendant-Appellee Borough of Naugatuck.

McLAUGHLIN, Circuit Judge:

The shades of Jarndyce & Jarndyce stalk this litigation. Charles Dickens, Bleak House. For the third time in a decade, we enter the legal morass created by a half-century of dumping hazardous waste at two Connecticut landfills, named Beacon Heights and Laurel Park, respectively. This time around, we consider, among other things, to what extent several municipalities must contribute to response costs that two coalitions of corporate polluters incurred cleaning up the mess.

BACKGROUND

We have set forth this case's background in exhaustive detail in two prior opinions. See B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) ("Betkoski"); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) ("Murtha"). We presume some familiarity with these opinions and state only the facts pertinent to this appeal.

A. Procedural History

The Beacon Heights and Laurel Park landfills accepted industrial wastes, e.g., liquid chemical wastes, deposited by commercial entities and accepted municipal solid waste ("MSW") deposited by several Connecticut municipalities. After the evidence confirmed that leachate[1] was escaping from the landfills--a condition that threatened the local water supply--the Environmental Protection Agency ("EPA") designated the landfills as "Superfund" sites on the National Priority List under the

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[1] The EPA defines leachate as "any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste." 40 C.F.R. § 260.10 (2002).

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § § 9601-75, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986).

The EPA began to identify the parties it believed were responsible for causing the mess. The EPA identified, among others, Terrance and Harold Murtha, and several corporations controlled by them (collectively, the "Murthas"), who owned and operated Laurel Park from 1961 until 1987 and owned Beacon Heights from 1970 to 1987. The EPA also identified several companies that had dumped waste at the landfills as potentially responsible parties ("PRPs").

Two eponymous coalitions comprising corporate polluters, the Beacon Heights Coalition[2] (the "BHC") and the Laurel Park Coalition[3] (the "LPC"), eventually emerged, entering into separate consent decrees with the EPA. Betkoski, 99 F.3d at 512. Under the consent decrees, the Coalitions agreed to "remediate" (i.e., clean up) the environmental damage to their namesake landfills. Id. Remediation at each landfill required placement of a cap over each landfill and extraction and treatment of dump

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2 Only three of the BHC's thirty-two members are participating in this appeal--Goodrich Corporation (f/k/a B.F. Goodrich Company), Crompton Manufacturing Company (f/k/a Uniroyal Chemical Company, Inc.) and Reynolds Metal Company (f/k/a Reynolds Aluminum Building Products Company).

3 The following nine of the LPC's nineteen members are participating in this appeal--Crompton Manufacturing Company, Kerite Company, Unisys Corporation, Risdon Corporation, Cadbury Beverages, Inc., Coltec Industries, Inc., Naugatuck Glass Company, Naugatuck Treatment Company and BP Amoco.

leachate and groundwater from the landfills.

As we explained in Betkoski the Murthas settled the claims brought against them by the United States, the State of Connecticut and the BHC, and assigned to the BHC any contribution claims they had against other third-party defendants. Id. Although the Laurel Park Coalition had not been formed when the Murtha consent decree was negotiated, the parties agreed that should an industrial coalition form within 18 months of the entry of the Murthas' consent decree, the coalition would receive a portion of the funds. The LPC formed within that time period and received the allotted funds. Id.

Thereafter, the Coalitions pursued claims against hundreds of third party defendants, including several Connecticut municipalities, seeking contribution toward the costs of the cleanup, pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f). The Coalitions' contribution claims against the municipalities are posited on the presence of hazardous substances, as constituent parts of consumer and industrial products, in the MSW that the municipalities dumped into the landfills.

In Murtha, we considered the municipalities' appeal from the district court's denial of their motion for summary judgment on the contribution claims brought against them, the BHC, and the Murthas.[4] The municipalities argued that: (1) MSW did not fit within CERCLA's definition of "hazardous substance"; (2) the exemption for household hazardous waste under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § § 6901-6992k, was incorporated into CERCLA; and (3) we should defer to the EPA's interpretation of CERCLA, which purportedly excluded MSW from the definition of "hazardous substance." Murtha, 958 F.2d at 1199, 1201, 1205. We rejected each of these contentions,

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[4] The LPC had not yet formed at this time.

holding that "the definition of hazardous substance under CERCLA includes municipal solid waste if that waste contains a hazardous substance, found in any amount, that is listed in any of the subsections" of 42 U.S.C. § 9601(14). Murtha, 958 F.2d at 1206.

On remand, the municipalities again moved for summary judgment, this time seeking dismissal of the contribution claims brought by both BHC and LPC. The district court granted the municipalities' motion, holding that they bore no liability whatsoever for contribution under CERCLA because: (1) while products found in their MSW may have contained components or elements identified as hazardous substances under CERCLA, the products were not themselves listed as hazardous substances under the Act; (2) the hazardous substances contained in the products were not in releaseable form; and (3) they dumped only negligible amounts of hazardous substances. B.F. Goodrich Co. v. Murtha, 815 F. Supp. 539, 545-46 (D.Conn. 1993).

On appeal, we reversed the district court's grant of summary judgment to the municipalities, holding that: (1) a mixture or waste solution containing any hazardous substance, even if contained only as a constituent element of a product, is deemed "hazardous" under CERCLA; (2) a defendant who disposes of hazardous substances that are not independently releaseable when the waste is dumped may still be held liable under CERCLA; (3) CERCLA's "hazardous substance" definition includes even minuscule or nominal amounts; and (4) genuine issues of material fact precluded summary judgment on whether there were hazardous substances contained in the solid waste the municipalities deposited at the landfills. Betkoski, 99 F.3d at 515-16, 526-27. Accordingly, we remanded the case to the district court for further proceedings.

By this juncture, the Coalitions had settled their claims against the vast majority of third-party defendants.

On remand, the district court referred the Coalitions' contribution claims against the remaining municipalities and other third-party defendants to a Special Master (the "Master"), for mediation and, if necessary, an evidentiary hearing followed by a report and recommendation (the "Report") pursuant to Fed.R.Civ.P. 53(e). The Order of Reference charged the Master with "finding facts, drawing conclusions and recommending what, if any, contribution the involved Third- Party Defendant, or potentially responsible party, should be required to make under CERCLA as it has been interpreted by the Second Circuit Court of Appeals." Moreover, the Order of Reference required the Master's report to "recite the factors on which a recommended equitable allocation of the remediation cost as to a Third Party Defendant or potentially responsible party is based."

B. Proceedings Before the Master

Through the Master's mediation efforts, a few more third-party defendants settled the Coalitions' contribution claims against them. Thus, when the Master's mediation efforts concluded, only a handful of third-party defendants remained in the contribution action, including defendants the Towns of Hamden, Middlebury, Orange, Seymour and Westport and the City of New Haven (collectively, the "Municipal Defendants"), and defendant-appellee the Borough of Naugatuck. Accordingly, the Master proceeded to the merits of the Coalitions' contribution claims against these parties.[5]

The Master held an evidentiary hearing over a six-month period, during which 41 witnesses testified and

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5 The Town of Plymouth, Jacob Bros., Inc. George Clark, John Betkoski and Zollo Drum Co. also remained as defendants, though they are not parties to this appeal. Accordingly, we omit discussion of issues that pertain solely to them.

over 500 evidentiary exhibits were introduced. We summarize the testimony of the parties' key witnesses below.

The Coalitions relied extensively on the testimony of Dr. Kirk W. Brown, a Professor of Soil and Crop Sciences at Texas A & M University, to support their claim that the Municipal Defendants' MSW contained hazardous substances that were eventually released into dump leachate. Dr. Brown testified that MSW typically contains partially-spent containers of common household and industrial products, the contents of which contain some hazardous substances. According to Dr. Brown, the hazardous components of such products are eventually released from their containers and find their way into leachate at landfills. He compared the "contaminants of concern" which the EPA said were in the dump leachate at both landfills with the hazardous substances typically found in MSW. Dr. Brown concluded that hazardous substances released from the Municipal Defendants' waste were likely a major source of hazardous substances found in leachate at the landfills. He did not undertake a site-specific analysis of the MSW dumped at each of the landfills. Rather, he relied on studies by the EPA and others, which he believed showed that the amount of hazardous substances present in a given town's MSW generally will comport with a national profile.[6]

Additionally, the LPC and BHC each presented allocation experts who submitted recommended allocation formulas for the court to apply in assessing contribution shares. The LPC elicited testimony from Austin Carey, Esq., an attorney who had participated in the formation of LPC. Carey explained that the LPC members, with the help of a neutral consultant, had created an allocation formula

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6 He also referred to samples he had taken from seeps of other MSW--only landfills which he claimed confirmed the presence of hazardous substances in MSW.

to apportion responsibility for response costs among its members. The LPC's allocation model incorporated the volume of waste each party deposited, adjusted by: (1) a hazard factor designed to account for the relative toxicity of each party's waste and the relative mobility of the hazardous substances contained therein; and (2) compaction and burning factors to account for changes in the waste's volume after it was dumped.[7] Using this model, Carey allocated percentage shares of response costs for Middlebury, Orange and Seymour as 4.72%, 3.41% and 3.22%, respectively.[8]

As its allocation witness, the BHC presented Richard Lane White, a director of the consulting firm Putnam, Hayes & Bartlett, Inc. ("Putnam Hayes"), who submitted an expert report allocating response costs among the parties alleged to be liable for response costs at Beacon Heights. The BHC's "cost-causation" model was based on the volume of waste each party deposited, adjusted by: (1) compaction and burning factors; and (2) a cost-

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7 As used by the parties in this case, "toxicity" refers to the relative presence of a hazardous substance in a party's waste, whereas "mobility" refers to a hazardous substance's propensity to find its way through the landfill into dump leachate.

8 The model did not incorporate the total volume of waste disposed by all polluters; rather, it used data limited to LPC members and the defendants who had not settled with the LPC at the time the model was applied.

causation factor[9] designed to account for the specific response costs incurred by the party's waste. Using this formula, White allocated the Municipal Defendants' percentage share of response costs for Orange, Seymour, Westport, Hamden, New Haven and Middlebury as 8.9256%, 5.8077%, 32.2511%, 2.1040%, 2.8554% and 1.9640%, respectively.

Additionally, the Coalitions sought to establish the volume of waste disposed of by the Municipal Defendants. Among other evidence, they relied on the Municipal Defendants' responses to discovery orders and the testimony of Terrance Murtha, who testified about the Murthas' business practices in hauling and disposing of waste.

The Coalitions also presented extensive evidence concerning the costs they incurred cleaning up the landfills. These costs were tremendous: the BHC claimed it spent over $50 million for remediation of Beacon Heights, while the LPC claimed it spent over $30 million for remediation of Laurel Park.

The Municipal Defendants countered Dr. Brown's testimony with testimony from Dr. Robert K. Ham, Professor Emeritus of Civil & Environmental Engineering

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9 For purposes of this factor, Mr. White separated the BHC's response costs into five categories: (1) excavation and capping of the landfill; (2) venting and treatment of methane; (3) leachate treatment; (4) leachate collection; and (5) offsite groundwater contamination. With respect to categories (1) through (4), Mr. White opined that because allocation based on adjusted volume adequately reflected cost-causation, all wastes should be treated similarly. Because Mr. White believed that liquid wastes were more likely to have incurred the response costs associated with category (5), he assigned a multiple of 15 to liquid waste shares.

at the University of Wisconsin Madison. Dr. Ham testified generally that: (1) the hazardous substances found in MSW are far less releaseable and mobile than those found in industrial waste; (2) the most releaseable and mobile hazardous substances deposited at the landfills were liquid wastes deposited by Coalition members; (3) the hazardous constituents contained in MSW are released only after their containers decompose, which occurs over a long period of time; and (4) such hazardous constituents will not pose a threat to the environment if they bond with other chemicals present in the landfill and form new, nonhazardous substances before they escape from the landfill. Nevertheless, Dr. Ham conceded that MSW contributed to groundwater contamination at the landfills. Additionally, the Municipal Defendants presented an alternative to the Coalitions' recommended allocation formulas. This they did through testimony from their allocation expert, Muriel Robinette, a Vice President of Haley & Aldrich, Inc. ("Haley Aldrich"). Not surprisingly, Ms. Robinette advocated apportionment of response costs to the Municipal Defendants in lower percentage than the Coalitions' experts' allocation. Her allocation models, which were substantially similar for each landfill, were based on the total volume of waste dumped by each party, adjusted by compaction, burning, cost- causation, toxicity, mobility and persistence[10] factors. Ms. Robinette allocated percentage shares of response costs at Laurel Park for Middlebury, Seymour and Orange as 1.29%, 0.62% and 0.54%, respectively. She allocated the percentage shares of response costs at Beacon Heights for Orange, Seymour, Westport and Middlebury as 0.3989%, 0.2639%, 1.3576% and 0.0149%, respectively[11] These lower percentages

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10 Ms. Robinette used the term "persistence" to refer to the length of time a hazardous substance could continue to exist in a recognizable state.

reflected her view that the hazardous substances in the Municipal Defendants' wastes were not significant "drivers" of many of the response costs undertaken by the Coalitions. For example, she opined that had MSW alone been deposited in the landfills, a less costly cap would have been required to control leachate, and that groundwater and leachate extraction would not have been required. Nevertheless, she conceded that the amount of waste dumped at a landfill will affect the size and attendant cost of the cap.

The Municipal Defendants countered the Coalitions's response cost evidence through, among other things, testimony from Jeffrey A. Klaiber, also a Vice President of Haley & Aldrich. Mr. Klaiber focused his opinion on whether the response costs claimed by the Coalitions were necessary and whether they conformed to the national contingency plan (the "NCP") under CERCLA § 107(a)(4)(B). According to him, the BHC's and LPC's recoverable response costs were limited to approximately $20 million and $19 million, respectively. Like Ms. Robinette, he opined that had Beacon Heights and Laurel Park accepted only the Municipal Defendants' MSW, the landfills would have been covered with far less expensive caps.

C. The Master's Report

After the parties submitted their proposed findings of fact, the Master submitted his Report.

The Master provided only scant details of the volume of waste dumped by the Coalitions, limiting his findings in this regard to the amount of waste dumped by BHC member Uniroyal Chemical Company ("Uniroyal") at Beacon Heights from 1947 to 1976. For the better part of

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11 Ms. Robinette did not allocate percentage shares to Hamden and New Haven, claiming she lacked sufficient data concerning the volume of waste dumped by these defendants.

his Report, he did not differentiate between Beacon Heights and Laurel Park, and he spoke of the Coalitions and their wastes in general terms. He characterized the Coalition members as "major corporations" whose "wastes consist of by-products of their manufacturing process." Throughout his Report, the Master referred to the Coalitions' waste as "liquid and other chemical wastes," and "highly mobile and toxic chemical waste." In general, he found the Coalitions' waste to be more toxic as a whole, and the hazardous substances found therein more mobile and more releaseable, as compared to the Municipal Defendants' waste.

Curiously, the Master never mentioned the volume of waste dumped by the Municipal Defendants, focusing instead on its characteristics. In this regard, he rejected Dr. Brown's assertion that MSW comports to a national profile. Rather, he found that MSW "has no definition which is applicable universally to the waste streams of each and every municipality. Its components vary with the demographic makeup of the community which generates it." The Master criticized Dr. Brown for failing to undertake a site-specific analysis to determine whether the Municipal Defendants' waste contained partially spent containers of the products he referred to in his expert report and testimony and for failing to analyze whether the Municipal Defendants had implemented sorting and separation policies for waste disposal whereby certain household products containing hazardous substances would have been excluded from the MSW the Municipal Defendants dumped at the landfills. The Master further noted that the sources and studies Dr. Brown relied on for his definition of "general" MSW showed that hazardous substances comprised only 0.1% to 0.4% of the MSW's volume.

The Master also noted that the hazardous substances in MSW are not found in pure form; rather,

they are constituent elements in consumer products that remain in the products' containers after the products have been used. He credited Dr. Ham's testimony, finding that such hazardous substances release slowly over time, as the containers and the substances contained therein decompose. The Master further noted that even if the hazardous constituent elements found in these products are released, they will not pose a threat to the environment if they bond with other chemicals and "form new and different compounds."

Evaluating these and other factors, the Master recommended that the district court allocate no responsibility whatsoever to the Municipal Defendants. Having thus found that the Coalitions were not entitled to any recovery, he saw no need to make any fact findings regarding the amount of response costs the Coalitions incurred.

D. The District Court's Allocation of Response Costs

Predictably, the Coalitions submitted extensive objections to the Report. And equally predictably, the Municipal Defendants filed submissions urging the district court to adopt the Report, albeit with minor modifications. Thereafter, the court issued its ruling (the "First Ruling") on the parties' objections to the Master's Report. The Court later amended certain of its findings in response to the parties' motions for reconsideration (the "Second Ruling").

The court adopted the Master's findings regarding the high toxicity of the Coalitions' waste and the mobility and releaseability of the hazardous constituents found in their liquid waste. The court went on to supplement the Master's Report with extensive findings describing the type and volume of waste dumped by the Coalitions at each landfill and the effect that burning the waste had on reducing the waste's residual volume. In this regard, the court found that the Coalitions dumped both liquid and hazardous wastes at their respective landfills. Notably,

however, the court found that while LPC members deposited large amounts of liquid hazardous wastes at Laurel Park, "the greater bulk was comparable to MSW."

The court also supplemented the Master's findings by determining the volume of MSW dumped by each Municipal Defendant, accepting, in large part, the amounts suggested by the Coalitions. The court found that the Municipal Defendants dumped MSW as follows: (1) Hamden--4,770,009 gal.; (2) New Haven--6,473,583 gal.; (3) Orange--20,235,349 gal.; (4) Seymour-- 13,166,688 gal.; (5) Westport--73,116,636 gal., reduced after burning to 286,066 cu. yds.;[12] and (6) Middlebury--19,796 cu. yds.

Regarding Laurel Park, the district court accepted the LPC's estimates and found that the Municipal Defendants dumped MSW at the landfill as follows: (1) Orange--177,407 cu. yds.; (2) Seymour--143,577 cu. yds. compacted and an additional 47,651 cu. yds. uncompacted; and (3) Middlebury--228,854 cu. yds. compacted and an additional 47,651 cu. yds. uncompacted.

The court also assessed the Master's findings regarding the quality of the Municipal Defendants' MSW. Assessing evidence concerning the relative presence of hazardous wastes in the Municipal Defendants' MSW, the court accepted the Master's observations that: (1) a typical town's MSW will not necessarily comport to a general national profile; and (2) the Coalitions failed to account for any sorting and separation procedures the Municipal Defendants may have implemented to reduce the presence of hazardous substances in MSW. While the court found that these concerns were equitable factors for its consideration, it was unimpressed with the Municipal Defendants' sorting and separation procedures, finding

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12 According to the district court's conversion method, which was advocated by the BHC's allocation expert, 1 cu. yd. = 201.98 gal.

them "neither uniform nor all-encompassing over the period of waste disposal in question...." In the end, the court affirmed the Master's finding that the record reflected, at most, a concentration of hazardous substances in the Municipal Defendants' MSW of 0.1% to 0.4%.

Ultimately, however, the court rejected the Report's recommended allocation, finding that the Municipal Defendants' "experts' evidence suggests that some allocation was appropriate." The court then set forth the list of equitable factors it applied in allocating the parties' contribution shares. Among other factors, the court considered: (1) the total volume of waste each party disposed; (2) the amount of hazardous substances contained in each party's waste; (3) the form of the hazardous substances–i.e., liquid or solid; (4) the releaseability of the hazardous substances, including the amount, if any, of decomposition required and the effect of the substances' interaction with other matter such that new, non-hazardous, compounds form; and (5) the mobility of the hazardous substances in each party's waste. The district court was also impressed by each Coalition's decision to enter into the Consent Decrees and to remediate their respective landfills. The court believed that their cooperation with the Government entitled them "to some benefit of the doubt as to the equitable factors and factual uncertainty in allocating [response costs.]"

To determine each Municipal Defendant's contribution share, the court fashioned an allocation model of its own creation, which incorporated: (1) the combined total volume of waste deposited by the Coalitions and Municipal Defendants at the respective landfills; (2) the volume of MSW each Municipality dumped; and (3) a toxicity factor for each Coalition's liquid and industrial waste as contrasted with its members' and each Municipal Defendant's MSW.

Applying this formula, the court allocated

contribution shares among the Municipal Defendants as follows:

- For response costs incurred by the LPC: (1) Orange--4.29%; (2) Seymour-- 3.1%; and (3) Middlebury--4.8%.
- For response costs incurred by the BHC: (1) Orange--2.26%; (2) Seymour-- 1.52%; (3) Westport--6.51%; (4) Hamden--0.27%; (5) New Haven--0.45%; and (6) Middlebury--0.45%.[13]
- The court also allocated a 1.1% share to Naugatuck, but held, as an equitable factor, that its contribution payment would be offset by $325,000 to reflect a settlement payment the Naugatuck Treatment Company ("NTC") made to the BHC using funds that belonged to Naugatuck.

The court also issued findings regarding the Coalitions' response costs in its initial and subsequent decisions. All told, the court calculated BHC's recoverable response costs as $39,818,648.26 and LPC's recoverable response costs as $14,005,975.27. The court then subtracted from these figures the total settlement proceeds the Coalitions previously received from other third- party defendants.[14] The resulting totals--$32,600,263.26 for BHC

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13 The district court did not allocate any of the BHC's response costs to Middlebury in its First Ruling, erroneously believing the BHC had settled its claims against that defendant. The court corrected its error in its Second Ruling.

14 The district court noted the absence of evidence in the record concerning the volume and type of waste disposed of by other parties that had settled with the Coalitions. Accordingly, the court assumed that the settlement amounts paid by these non-parties adequately reflected their allocable share of the Coalitions' response costs.

and $5,237,587.37 for LPC--were the amounts against which the Municipal Defendants' percentage contribution shares were assessed.

In its Second Ruling, the court granted the Coalitions' request for pre- judgment interest. The court rejected their claim of entitlement to compound interest, opting instead to apply simple interest. Thereafter, on August 2, 2000, the court entered its final judgment on the BHC's contribution claims in the following amounts, inclusive of pre-judgment interest: (1) Middlebury--$186,779.94; (2) Westport--$2,702,083.23; (3) New Haven--$186,779.94; (4) Orange--$938,050.39; (5) Seymour--$630,901.16; and (6) Naugatuck--$46,933.87. In the same judgment, the court awarded the LPC the following amounts, inclusive of pre-judgment interest: (1) Orange--$239,471.69; (2) Seymour-- $204,507.50; and (3) Middlebury--$316,656.78. Later, however, the court amended its judgment regarding the LPC's claims to include a declaratory judgment establishing the Municipal Defendants' liability for LPC's future response costs.

The Municipal Defendants appeal the district court's allocation, arguing they should not be required to contribute any share of the response costs. They also contend the court erred by failing to hold a hearing prior to ruling on the Coalitions' objections to the Master's Report.

The LPC appeals from the district court's denial of its claim to certain response costs and the court's interest awards.

The BHC also appeals, asserting that the district court erred by allowing Naugatuck to offset its contribution share.

DISCUSSION

I. The District Court's Allocation

1. Overview

CERCLA § 113(f) provides: "Any person may seek

contribution from any other person who is liable or potentially liable under § 9607(a).... In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Thus, the statute envisions a two- part inquiry: First, the court must determine whether the defendant is "liable" under CERCLA § 107(a); Second, the court must allocate response costs among liable parties in an equitable manner. See Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 656-57 (6th Cir. 2000). The party seeking contribution bears the burden of proof at both prongs of the court's inquiry. See, e.g., Minyard Enters., Inc. v. Southeastern Chem. & Solvent Co., 184 F.3d 373, 385 (4th Cir.1999); H.R.Rep. No. 99-253(III), at 19 (1985) ("Of course, the burden of proof is on the ... party seeking apportionment to establish that it should be granted.").

As we explained in Betkoski, (the last time these parties were before us), a finding of liability under § 107(a) requires proof that:

> (1) the defendant is within one of the four categories of responsible parties enumerated in § 9607(a); (2) the landfill site is a facility as defined in § 9601(9); (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred costs responding to the release or threatened release; and (5) the costs and response actions conform to the national contingency plan.

99 F.3d at 514. The district court held that the Municipal Defendants are liable under this test, and they do not appear to contest that finding on appeal. In any case, the district court was clearly correct.

With regard to the first element of this test, those who arrange for disposal of hazardous substances are among the "responsible parties" covered under § 9607(a).

And, as we first explained in Murtha, "[w]hen a mixture or waste solution contains hazardous substances that mixture is itself hazardous for purposes of determining CERCLA liability." Murtha, 958 F.2d at 1201. The Municipal Defendants acknowledge that their MSW contained hazardous substances, conceding that "[f]rom the testimony of Dr. Ham ... this fact or conclusion was inescapable." The Municipal Defendants also concede the remaining elements of the liability test, i.e., that hazardous substances were released from the landfills, and that the Coalitions incurred response costs and undertook response actions that conform to the NCP.[15] Accordingly, we turn to the Municipal Defendants' objections to the district court's allocation.

2. Standard of Review

We begin with our analysis by settling upon the standard of review, an issue that is hotly debated by the parties-and well it should because we find it determinative. As we have stated before, because "[Section 113(f)'s] expansive language ... affords a district court broad discretion to balance the equities in the interests of justice.... We will not overturn the district court's [allocation of response costs] absent an abuse of that discretion." Bedford Affiliates v. Sills, 156 F.3d 416, 429 (2d Cir.1998) (emphasis added) (citations omitted).

"A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within

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15 While the Municipal Defendants quarrel over the district court's determination of the amount of response costs incurred by the BHC, which we address in Part II, supra, they do not dispute that the BHC incurred at least some necessary response costs consistent with the NCP.

the range of permissible decisions." Zervos v. Verizon New York, Inc., 252 F.3d 163, 169 (2d Cir.2001). The Municipal Defendants raise several arguments seeking to avoid this deferential standard of review. We address each argument in turn.

The Municipal Defendants' first argument rests on a clause in the Order of Reference stating the standard the district court would apply when it reviewed the Master's Report:

> Any factual objection will be decided on whether the finding or recommendation is clearly erroneous based on the record before the Special Master.

(emphasis added). The Municipal Defendants assert that this clause extended to non-factual members and, accordingly, bound the district court to the Master's recommended equitable factors and allocation of response costs among the parties unless there was clear error. This loose reading of the Order's standard of review is inconsistent with the Order's terms and even with the Master's understanding of his role in the case.

A separate section of the Order of Reference discussing the mediation stage of the litigation states: "The success of mediation depends on the acknowledgment by each party that the decision after a hearing cannot be predicted. That uncertainty arises from the 'equitable factors' to be applied by the Court as 'appropriate' in accordance with CERCLA § 113[f]." (emphasis added). Thus, in referring the case to the Master, the district court clearly reserved to itself the power to allocate response costs among the parties according to the equitable factors it, not the Master, found appropriate to the case.

The Master himself acknowledged this on several occasions. For example, he advised the parties that "the ultimate question to be decided in this case, under § 113[f], is almost unpredictable, except to the extent that you can judge what Judge Dorsey believes to be a

reasonable set of equitable factors. . . ." (R. 1/29/1998 at 198:19-24.) Likewise, the Master stated "I don't decide what equitable factors are equitable factors.... [T]he statute places the broadest discretion in the hands of Judge Dorsey and not me. And the statute specifically says equitable factors that he deems to be appropriate, not that I deem to be appropriate." (R. 4/1/1998 at 204:11-16.) Thus, the Master clearly understood what the Order of Reference made apparent: that the district court reserved the right to determine the appropriate equitable factors to apply, and the appropriate allocation of response costs among the parties, unbridled by the clear error standard of review.

Next, the Municipal Defendants claim that, because allocation of liability under CERCLA is a question of fact, we must review the Master's recommended allocation directly, for clear error. This is a none too subtle begging of the question. It is true that we review a master's factual findings for clear error, whether or not the district court accepts them. Morris Plan Indus. Bank v. Henderson, 131 F.2d 975, 976-77 (2d Cir.1942); see also Fed.R.Civ.P. 53(e)(2). However, we are not persuaded that the allocation of response costs under § 113(f) is a question of fact. Rather, it is an equitable determination based on the district court's discretionary selection of the appropriate equitable factors in a given case.
See Bedford Affiliates, 156 F.3d at 429.[16]

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16 The Municipal Defendants cite our decision in United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir.1993), and the Fifth Circuit's decision in In re Bell Petroleum Servs., Inc. (EPA v. Sequa Corp.), 3 F.3d 889 (5th Cir.1993), for the proposition that allocation of response costs is a question of fact. Both these cases, however, concerned apportionment of damages under the divisibility of harm defense available to defendants in a § 107(a) cost recovery action. See Bell Petroleum, 3 F.3d at 896; Alcan Aluminum, 990 F.2d at 722. In such

The Municipal Defendants also maintain that we are required to ignore the district court's allocation of response costs and instead review directly the Master's recommended allocation for abuse of discretion, citing Van Gemert v. Boeing Co., 739 F.2d 730 (2d Cir.1984). In Van Gemert, we reviewed the district court's equitable distribution of the unclaimed balance of a judgment

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cases, a potentially responsible party may avoid joint and several liability if it can prove the environmental harm at a site is divisible. Upon such a showing, the party will be held liable only for the harm the court finds it caused. Bell Petroleum, 3 F.3d at 901-02; Alcan Aluminum, 990 F.2d at 722. Admittedly, the district court's apportionment of damages in such cases is a finding of fact. Bell Petroleum, 3 F.3d at 896; see also Alcan Aluminum, 990 F.2d at 722 ("[A]pportionment itself is an intensely factual determination."). However, unlike allocation of response costs under § 113(f), § 107(a)'s "divisibility of harm inquiry ... is guided not by equity ... but by principles of causation alone." United States v. Hercules, Inc., 247 F.3d 706, 718 (8th Cir.2001). This difference renders Alcan Aluminum and Bell Petroleum inapposite.

In Boeing v. Cascade Corp., 207 F.3d 1177 (9th Cir.2000), a § 113(f) case cited by the Municipal Defendants, the court held that while the district court's choice of equitable factors is reviewed for abuse of discretion, its "allocation according to those factors" is reviewed for clear error. Id. at 1187; see also id. at 1188 ("We review the district court's allocation as a finding of fact for clear error."). As support for its holding, however, the court cited Alcan Aluminum and Bell Petroleum. See Boeing Co., 207 F.3d at 1187 & n. 33, 1188 & n. 39. As we explained above, we find the standard of review provided in Alcan Aluminum and Bell Petroleum inapposite to the standard of review in a § 113(f) case. For the same reasons, we find Boeing unpersuasive.

entered against the defendant. In determining whether the district court abused its discretion in returning the unclaimed funds to the defendant, we looked to the special master's report and recommendation, which the district court had adopted in full. Id. at 733, 736-38. Thus, Van Gemert stands for the unremarkable proposition that where a district court charged with making an equitable determination adopts a master's recommendation on that issue, we review the master's report and recommendation to determine whether the district court abused its discretion. Id. at 738. Of course, that is not the case here--the district court rejected the master's recommended allocation and allocated response costs according to the equitable factors it determined were appropriate under the circumstances of the case. Accordingly, Van Gemert is inapposite.

Finally, the Municipal Defendants claim that the district court was required to accept the Master's recommended allocation absent the Master's abuse of discretion, citing Gottlieb v. Barry, 43 F.3d 474 (10th Cir.1994). In Gottlieb, the court considered whether the district court abused its discretion in choosing the appropriate method for determining attorneys' fees in a securities class action where the district court rejected the master's recommendation on that issue. The court noted that because the way to calculate fees depended on the "particular circumstances of the case," the district court should have "given some deference" to the master's recommendation, which resulted from his special knowledge of the case. Gottlieb, 43 F.3d at 487. Finding that the district court had "simply rejected" the master's recommendation "for reasons largely unrelated to the particular circumstances of [the] case," the court reversed the district court's decision and found that attorneys' fees should be calculated as the master recommended. Id.

Consistent with Gottlieb, we hold that a district

court must give "some deference" to a master's recommendation where the master has "direct and extensive" knowledge about the particular circumstances of a given case. Id. at 487 & n. 10; see also Cook v. Niedert, 142 F.3d 1004, 1010 (7th Cir.1998). "A district court that extends some deference to the master will consider his recommendation and the factors influencing it, but will not regard the recommendation as the alpha and omega of the ... analysis." Id.

3. Analysis

Turning to the merits of the Municipal Defendants' claims, we believe the district court gave appropriate deference to the Master's recommendation and did not abuse its discretion in allocating contribution shares among the Municipal Defendants. The court undertook a painstaking analysis of the Master's Report, accepted most of the equitable factors suggested therein, and incorporated them into its allocation model. Moreover, to the extent the court supplemented the factors suggested by the Master or, conversely, did not apply factors recommended by the Master, we find that it acted within its discretion. We address the district court's allocation and the Municipal Defendants' objections thereto below.

The district court cited the volume of waste disposed of by the parties as an equitable factor and used his findings on the parties' respective waste volumes as the starting point of his allocation formula. The Municipal Defendants do not deny that the volume of waste each party disposed of is a legitimate equitable factor. Indeed, their own allocation expert opined that it is a logical starting point in cases of this type.

Nevertheless, the Municipal Defendants claim the district court erred in supplementing the Master's findings on the volume of MSW they disposed of. First, they argue that the district court is powerless to make supplemental findings of fact, even where the Master failed to make any

findings on an issue. We reject this contention as contrary to the Federal Rules of Civil Procedure, which expressly permit a district court to "modify" a special master's report. Fed.R.Civ.P. 53(e)(2); cf. United States v. Tampa Bay Garden Apartments, Inc., 294 F.2d 598, 603 (5th Cir.1961) ("We do not think the power to modify [under Rule 53(e)(2)] is to be narrowly construed or applied. The power to modify is a power to alter or change, and to enlarge and add to as well as to limit, restrict or reduce.").

Next, we reject their claim that the Master's failure to render any findings on the volume of waste they dumped is tantamount to a factual determination that the Coalitions did not carry their burden of proof on this issue. We find nothing in the Master's Report to support this suggestion. Moreover, the Municipal Defendants' argument is specious, when it is recalled that they expressly admitted in their proposed findings of fact that they each dumped a significant volume of MSW at one or, in some cases, both of the landfills.

The Municipal Defendants also claim that the district court clearly erred by preferring the Coalitions' estimates of the volume of waste each Municipal Defendant dumped over the municipalities' own estimates. In this regard, the Municipal Defendants do not contend that the district court relied on inadmissible evidence; rather, they simply assert that the court should have accepted their own estimated waste volumes. However, "[t]he mere fact that there was evidence to support an inference contrary to that drawn by the trier of fact does not mean that the findings were clearly erroneous." Cifra v. G.E. Co., 252 F.3d 205, 213 (2d Cir.2001); see also Anderson v. Bessemer City, 470 U.S. 564, 574, (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Accordingly, we reject the Municipal Defendants' contention that the district court's volume

findings resulted from clear error.

Next, the Municipal Defendants argue that the district court improperly ignored the Master's finding that MSW will not necessarily comport with a national profile in terms of the hazardous waste contained therein. Yet their own expert witness, Dr. Ham, testified:

> My point is that municipal solid waste is also very varied in composition. Yet as you look at the way we live, the way we all have a certain number of grocery stores per capita throughout the country and the grocery stores generally produce the same kinds of wastes and so forth, when you look at general MSW, it's amazing how similar it is from one part of the country to the other, with the only real difference being the amount of yard waste and when that yard waste occurs. So even though municipal solid waste is heterogeneous, it is, in fact quite uniform in character and predictable.

(R. 1/23/1998 at 24:1-11.) (emphasis added).

The Municipal Defendants also argue that the district court failed to account for sorting and separation policies adopted by the Municipalities that supposedly reduced the amount of hazardous substances in their MSW. Although the Master chastised Dr. Brown for failing to take this factor into account, he did not render any specific findings regarding the Municipal Defendants' implementation of such policies. And while the district court cited sorting and separation policies as an equitable factor to be considered, it found that the Municipal Defendants policies were neither "uniform nor all-encompassing over the period of waste disposal in question...." The record confirms this finding.

The Municipal Defendants also claim the district

court did not give appropriate deference to the Master's findings regarding the relative mobility and releaseability[17] of the parties' waste and abused its discretion by allocating response costs based on volume and toxicity alone. We reject this contention. Our review of the district court's decision reveals that the court carefully considered the relevance of these factors in determining how to allocate costs among the parties. While the court's ultimate methodology may have been imprecise, we cannot say it amounted to an abuse of discretion. Cf. Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 937 (8th Cir.1995) ("CERCLA, in the allocation stage, places the costs of response on those responsible for creating the hazardous condition. Allocating responsibility based partially on toxicity does just that because those who release substances that are more toxic are more responsible (affirming allocation based for the hazardous condition."); see also Bancamerica Comm. Corp. v. Mosher Steel, 100

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17 The Master found, per Dr. Ham's testimony, that the "preponderance of scientific evidence ... proves that such releases as may have occurred" of hazardous substances in the Municipal Defendants' MSW "formed new chemical compounds." This finding overstates Dr. Ham's testimony. Dr. Ham testified that some hazardous substances found in MSW may decompose and join with other elements found in MSW to form a new, non- hazardous, compounds. But, significantly, he did not testify that this process would occur all of the time. Rather, he admitted on cross- examination that, in his belief, MSW contributed to groundwater contamination at the landfills. Thus, Dr. Ham's testimony, taken as a whole, leads at most to a conclusion that some, but not all, of the hazardous substances found in MSW decomposed to form other compounds. The Master clearly erred by extrapolating an impermissible inference from Dr. Ham's testimony.

F.3d 792, 802-03 (10th Cir.1996)(affirming allocation based on volume and relative toxicity).

Finally, the Municipal Defendants argue that the district court ignored the Master's concerns over the lack of direct proof that releases of hazardous substances from their MSW added to the costs incurred by the Coalitions. In the district court's view, the Coalitions were entitled to some benefit of the doubt given their cooperation with the government. We are untroubled by this view. By entering into consent decrees with the government, the Coalitions ensured that the landfills would be remediated in an expeditious manner and relieved the government of future litigation costs. See Betkoski, 99 F.3d at 526 (CERCLA § 9622(a) urges the government to enter into "settlements in order to expedite effective remedial actions and minimize litigation."). The district court did not abuse its discretion in taking this factor into account. Cf. United States v. R.W. Meyer, Inc., 932 F.2d 568, 573 (6th Cir.1991) ("I do not believe Congress intended to require meticulous findings of the precise causative contribution each of several hundred parties made to a hazardous site. In many cases, this would be literally impossible. Rather ... Congress intended the court to deal with these situations by creative means, considering all the equities and balancing them in the interests of justice.").

In sum, we believe the court gave appropriate deference to the Master's recommendation and did not abuse its discretion in allocating contribution shares to the Municipal Defendants.

II. Objections to Response Costs and Offsets

1. Response Costs

As we stated earlier, CERCLA § 113(f) provides: "Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a).... In resolving contribution claims, the court may allocate response costs among liable parties using such equitable

factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). In turn, under CERCLA § 107(a)(4)(B), a plaintiff may recover "any ... necessary costs of response incurred ... consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(2).

A. The LPC's Litigation Costs

The district court deducted $8,768,387.00 from LPC's total response costs to arrive at the net recoverable response costs against which the Municipal Defendants' percentage contribution shares were assessed. The LPC contends that the court should have excluded $3,592,258.12--the amount the LPC expended in litigation costs settling those claims--from the total settlement proceeds to accurately reflect the amounts available to be expended on remediation. The district court rejected this argument as a back-door attempt to recover attorneys' fees, which are generally not recoverable under § 113(f). We agree.

"Neither CERCLA § 107, the liabilities and defenses provision, nor § 113, which authorizes contribution claims, expressly mentions the recovery of attorney's fees." Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994). Thus, "expenses incurred solely in preparation for litigation" cannot be recovered as response costs "unless they 'significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs.' " Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 91-92 (2d Cir.2000) (quoting Id. at 820). The LPC does not argue that the attorneys' fees it incurred significantly benefitted the cleanup effort. Rather, it claims Key Tronic only precludes an "award" of litigation expenses, and should not apply where a party seeks to decrease an offset to its recoverable response costs. We fail to see any distinction. As the district court reasoned, if the litigation costs are not excluded from LPC's total response cost, the Municipal Defendants will wind up footing part

of the bill-which would be akin to an award of fees. Accordingly, we affirm the district court on this issue.[18]

B. The BHC's Response Costs

The Municipal Defendants claim the district court erred by failing to articulate its findings on the BHC's response costs. In its First Ruling, the court held that the BHC incurred recoverable response costs totaling $40,664,785.77, despite the BHC's claim to have spent more cleaning up the landfill. The court did not set forth a detailed list of each response cost it found to be recoverable; rather, it addressed only certain response costs, regarding the remaining costs as uncontested.

The Municipal Defendants moved for reconsideration of the First Ruling, seeking an articulation of the court's findings as to each recoverable response cost. In response to the Municipal Defendants' motion, the BHC alerted the court that the $40,664,785.77 figure overstated the court's actual allowance of the BHC's response costs. Accordingly, the BHC set forth a two-column table illustrating in one column each cost it claimed in its proposed findings of fact and, in the second column, the deductions, if any, to each cost as per the First Ruling. Using this table, the BHC calculated its recoverable response costs as $39,818,648.26.

In its Second Ruling, the court adopted this revised figure, specifically referring the parties to the table provided by the BHC. Additionally, the court appended an unannotated adding tape, intended to reflect the court's correction of its mathematical error. While we agree with the Municipal Defendants that the district court's adding tape was not particularly illuminating, we hold that its findings were sufficiently articulated to put the Municipal

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[18] We also affirm the district court's denial of LPC's claim to response costs concerning: (1) drinking water supply line; (2) leachate alleviation; (3) "costs to complete"; and (4) EPA-directed construction supervisor.

Defendants on notice of the response costs allowed.

We also note that, except as discussed below, the Municipal Defendants failed to identify on appeal any BHC response cost erroneously allowed by the district court. Instead, the Municipal Defendants invite us to ferret out their objections by sifting through their submissions to the district court. We decline their invitation.

Finally, the Municipal Defendants claim, and the BHC concedes, that the district court erred by awarding BHC a lump-sum payment of $4,314,485.00, allocated among the various Municipal Defendants, representing the future discounted contingent operations and maintenance costs for the Beacon Heights site. In Gussack Realty Co. v. Xerox Corp., we held the "proper remedy for future response costs is not a present lump-sum payment of anticipated expenses but instead a declaratory judgment award dividing future response costs among responsible parties." 224 F.3d 85, 92 (2d Cir.2000) (per curiam); see also 42 U.S.C. § 9613(g)(2) ("[T]he court shall enter a declaratory judgment on liability for [future] response costs or damages...."). Here, as in Gussack Realty, "the district court provided a remedy not available under CERCLA." Gussack Realty, 224 F.3d at 92. Accordingly, we remand the case to the district court for entry of a declaratory judgment consistent with § 9613(g)(2).

2. Naugatuck Treatment Company's Settlement with the BHC

Naugatuck Treatment Company ("NTC")--a wholly-owned subsidiary of BHC member Uniroyal--is one of the many third-party defendants who settled with the BHC prior to trial. NTC--in exchange for a complete release from any further liability--paid the BHC $325,000.00 in 1993.

Five years later, during the proceedings before the Master, the Borough of Naugatuck produced evidence

showing that the $325,000.00 NTC gave to the BHC for the release was taken from a reserve fund held by NTC in escrow for the benefit of the Borough. The Borough's witness explained that the reserve fund was earmarked for major capital improvements at the Borough's treatment facility, not for paying down NTC's CERCLA liability.

After the hearings before the Master concluded, the Municipal Defendants argued in their papers that any contribution share attributable to the Borough for the BHC's response costs should be reduced by the NTC settlement. The Municipal Defendants claimed that NTC used the Borough's funds "without any approval from the Borough's governing body, its Mayor and Borough Burgesses...." Because the Master did not allocate any contribution share to the Borough, he saw no need to render any findings on the circumstances of NTC's settlement.

In its First Ruling, the district court rejected the Master's recommendation as to the Borough's liability for contribution. Instead, the court allocated the Borough a 1.1% share of responsibility for BHC's response costs, resulting in liability amounting to $361,862.92 "minus $325,000 that involved [NTC], a net of $46,465.05."[19] The district court offered no explanation for the offset.

Undeterred, the BHC asked the court to reconsider its ruling, contending that certain Borough officials knew, prior to NTC's settlement with BHC, that the reserve fund would be tapped to pay the settlement. Yet they did nothing to stop the payment. The district court upheld the offset, explaining "[w]hether payment was made with knowledge of [Borough] officials does not resolve BHC's argument. The question is not the propriety of the payment ... but rather whose money was used. As BHC

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19 The Borough's contribution share was later reduced to $36,862.92 to reflect the court's recalculation of BHC's response costs.

has not shown to the contrary, [Borough] funds are found to have been used. Thus the credit is proper."

BHC now appeals the court's decision, urging us to hold as a matter of law that § 113(f)'s "equitable factors" are limited to "those factors directly related to the harm to the environment, the parties' causal relationship to that harm, and the parties' ability to contribute to ... remediation...." As we held in Bedford Affiliates, however, Section 113(f) "does not limit courts to any particular list of factors." 156 F.3d at 429. Instead, "[t]he statute's expansive language ... affords a district court broad discretion to balance the equities in the interests of justice." Id.; see also Envtl. Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir.1992) (declining to limit equitable factors); United States v. R.W. Meyer, Inc., 932 F.2d 568, 572 (6th Cir.1991) ("[T]he court may consider the state of mind of the parties, their economic status, any contracts between them bearing on the subject, any traditional equitable defenses as mitigating factors and any other factors deemed appropriate to balance the equities in the totality of the circumstances.") (footnote omitted) (emphasis added). Accordingly, we reject the BHC's invitation to curb the district court's discretion to consider any equitable factors it deems appropriate.

The BHC also contends that the district court abused its discretion because the equities favor the BHC, not the Borough. As already noted, the BHC claims that certain Borough officials in charge of overseeing the Borough's operating agreement with NTC knew about NTC's planned use of the reserve fund but did nothing to stop it. It follows, BHC argues, that the Borough should not be rewarded for sitting on its rights.

Admittedly, the evidence before the Master suggests that members of the Naugatuck Water Pollution Control Board (the "WPCB")--i.e., the board that oversaw the operating agreement--did indeed know of NTC's

planned use of the reserve fund before the settlement. However, the evidence also showed that the WPCB was controlled at the time by Uniroyal employees. Thus, it is hardly shocking that the WPCB did nothing to stop the transaction, which enriched Uniroyal at the Borough's taxpayers' expense and permitted Uniroyal's wholly-owned subsidiary to escape liability for any cleanup costs.

In short, we believe the district court acted within its discretion by applying the credit, notwithstanding the WPCB's knowledge of NTC's planned use of the fund. Accordingly, we affirm the district court's decision to offset NTC's settlement amount against the Borough's allocated share of the BHC's response costs.

III. The District Court's Interest Calculations

1. Pre-Judgment Interest

The LPC argued to the district court that it was entitled under § 107(a)(4) to an award of compound prejudgment interest on the response costs for which the court held the Municipal Defendants liable. The district court disagreed, asserting that the right to pre-judgment interest, if any, is committed to the court's equitable discretion under § 113(f). The court then awarded the LPC simple, rather than compound interest. LPC claims the district court erred by: (1) treating pre-judgment interest under § 113(f) as discretionary; and (2) failing to award compound pre-judgment interest. As explained below, we agree with LPC on both counts.

We review these questions of statutory interpretation de novo. See Gussack Realty, 224 F.3d at 91. This Court has never addressed the availability of pre-judgment interest under CERCLA § 113(f), yet we find Bancamerica Comm. Corp. v. Mosher Steel, 100 F.3d 792 (10th Cir.1996), persuasive, and adopt its analysis. See id. at 799-803. Thus, we agree that "prejudgment interest must be awarded in § 113(f) cases just as it is in § 107(a) cases." Id. at 800.

Under § 107(a), pre-judgment interest is mandatory. 42 U.S.C. § 9607(a)(4) ("The amounts recoverable in an action under this section shall include interest on the amounts recoverable ....") (emphasis added). Thus, we agree with the LPC that the district court erred in treating pre-judgment interest as a discretionary award under § 113(f).

Next, we must determine whether the LPC is entitled to compound interest. Again, we look to § 107(a)(4), which provides:

> The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

Id. In turn, the rate of interest on investments of the Hazardous Substance Superfund:

> [S]hall be at a rate determined by the Secretary of the Treasury (as of the close of the calendar month preceding the month in which the advance is made) to be equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding and shall be compounded annually.

26 U.S.C. § 9507(d)(3)(C) (emphasis added). A straightforward reading of these statutory provisions reveals that the district court was without discretion to grant anything other than compounded interest at the applicable rates set forth by the Secretary of the Treasury. Bancamerica, 100 F.3d at 802.

Thus, we direct the district court on remand to recalculate pre-judgment interest on LPC's response costs, at the rates specified by the Secretary of the Treasury

compounded annually, accruing from the latter of the date LPC made its demand on the Municipal Defendants or the date of the expenditure concerned. See 42 U.S.C. § 9607(a) ("Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned.")[20]

2. Post-Judgment Interest

The district court initially entered judgment on the LPC's contribution claims on August 2, 2000 and ordered that post-judgment interest "shall accrue from the date of judgment. . . ." On January 5, 2001, the district court entered an amended judgment, which added a declaratory judgment regarding the Municipal Defendants' liability for the LPC's future response costs. The amended judgment was silent regarding post-judgment interest, though it stated that "[i]n all other aspects the [Initial] Judgment remains the same." The LPC argues that the district court should have expressly provided that post- judgment interest runs from the date of its first judgment.

Under 28 U.S.C. § 1961(a), a plaintiff is entitled to post-judgment interest calculated as of the "date of the entry of the judgment. . . ." Id. Such relief is "designed to compensate the plaintiff for the delay it suffers from the time damages are reduced to an enforceable judgment to

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[20] The record reveals that on August 18, 1995, LPC issued a written demand on each Orange, Seymour and Middlebury. The court accepted this demand as valid in its Second Ruling and invited the LPC to submit detailed information on its post-August 18, 1995 response costs. In response to the district court's suggestion, the LPC submitted a list delineating its post-August 18, 1995 response costs. It is not clear whether the district court accepted the dates set forth therein in calculating LPC's pre-judgment interest on a simple interest basis. We leave it to the district court to determine the dates from which the interest shall accrue and to ascertain the applicable Treasury rates.

the time the defendant pays the judgment." Andrulonis v. United States, 26 F.3d 1224, 1230 (2d Cir.1994). Thus, "post-judgment interest commences from the date a judgment is ascertained in a meaningful way" and "supported by the evidence." Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 55 (2d Cir.1998) (quoting id. at 1233) (internal quotation marks and alteration omitted).

Here, the district court's judgment on the LPC's past response costs was ascertained in a meaningful way on August 2, 2000. To the extent its amended judgment precluded interest from August 2, 2000, forward, the district court erred. Accordingly, we remand for appropriate recalculation of post-judgment interest on the LPC's past response costs.

IV. Failure to Hold a Hearing

The Municipal Defendants complain that the district court should not have ruled on the Master's Report without hearing oral argument on the parties' submissions. We disagree.

> Rule 53(e)(2) states, in relevant part:
> Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Fed.R.Civ.P. 53(e)(2) (emphasis added). The Municipal Defendants claim the above-underlined text mandates an oral hearing, an issue of first impression in this Court.

Several of our sister Circuits have weighed in on the issue and have uniformly found that there is a right to

an oral hearing at the behest of the objecting party. See, e.g., Kieffer v. Sears, Roebuck & Co., 873 F.2d 954, 956 (6th Cir.1989) ("[W]e hold that when a district court is presented with objections to the report of a special master, the objector has a right to a hearing ....") (emphasis added); In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 739 F.2d 1169, 1172 (7th Cir.1984) ("One who files objections to the report of a Special Master thus has a right to be heard on those objections before the court acts on the report.") (emphasis added); In re Wonderbowl, Inc., 424 F.2d 178, 180 (9th Cir.1970) ("[O][b]jectors to a referee-special master's report have a right to be heard before the bankruptcy court acts on the report.") (emphasis added). Even if we were to agree that the plain language of Rule 53(e)(2) entitles an objector to an oral hearing, this does not help the Municipal Defendants. As they readily admit in their appellate brief, they did not object to the Report; indeed, they requested its adoption.[21] Accordingly, they had no right to oral argument on the Coalitions' objections.

Additionally, counsel for the Municipal Defendants admitted at oral argument that the Municipal Defendants did not move for a hearing on the Master's Report. Thus, even if they did possess any rights to a hearing, they waived such rights by failing to ask for one. Cf. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-

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[21] Although the Municipal Defendants filed "exceptions" to the Master's Report, they did not object in any meaningful way. Rather, they simply referred the court to their proposed findings of fact and urged the court to accept their findings to the extent the were not reflected in, or conflicted with, the Master's Report. Additionally, the Town of Seymour filed an "Application for Adoption of the Special Master's Report with Modifications" urging the court to modify the report to specifically adopt the Municipal Defendants' allocation model.

Marine Ass'n, 8 F.3d 760, 768 (11th Cir.1993) ("This court will not overturn the district court's adoption of the special master's report on a procedural technicality consignors have discovered only on appeal.").

* * *

we have considered the remaining arguments raised by the Coalitions in their appeals and the Municipal Defendants in their cross-appeal and find them to be without merit.

CONCLUSION

For the reasons stated herein, we AFFIRM the district court's decision insofar as it allocated shares of the Coalitions' response costs to the Municipal Defendants, but VACATE the district court's:

- award of pre-judgment and post-judgment interest regarding the LPC's claims; and
- award of a lump-sum for the BHC's future recovery costs.

We REMAND the case for further proceedings not inconsistent with this opinion.

FILED
SEP 28 12:17 PM '99
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH ET AL	:	
	:	
-vs-		
HAROLD MURTHA	:	DOCKET NO. 3:87CV52(PCD)
	:	ALL CASES, CONSOLIDATED
-vs-	:	
	:	
RISDON ET AL		
	:	
CADBURY BEVERAGES, INC., ET AL	:	
-vs-		
A.J. OSTER ET AL		

RULING ON REPORT OF SPECIAL MASTER AND OBJECTIONS THERETO

The generation of trash and its removal was long treated as out of sight, out of mind. Dumps were a necessity but a problem only to one in whose backyard it was located. Dump day, in small towns, was a social event after which, with a little picking in the process, every one went to homes sufficiently removed to be blessed with

untainted air. As living space approached areas allocated to trash disposal and trash was found to contain wastes hazardous to the health of those living in proximity to the dump sites, concern heightened and prompted community regulation. The past came to haunt the present. Dump leachate containing hazardous wastes (HW) required remediation. Environment focus created the Environmental Protection Agency (EPA) and Connecticut Department of Environmental Protection (DEP). The mandate to clean up sites of past indulgence was enacted in 1980, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C § 9601 et seq (CERCLA), administered in conjunction with the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 et seq and the Resource Conservation and Recovery Act 42 U.S.C. § 6901 et seq (RCRA).

Before these laws were enacted, two sites that are the subject of this litigation received wastes, Beacon Heights (BH) and Laurel Park (LP), bucolic names substantially out of character with the problems posed. As wastes were dumped, little thought was given as to whether it would remain out of sight and out of mind. Hazardous Substances (HS) found their way onto adjacent property and into underground water and attracted EPA's and DEP's attention. Each site warranted designation as Superfund sites requiring substantial remediation of HS spewing from their bowels.

The problem called for prompt remediation, a quick and fair identification of responsible parties, and a just response cost (R.C.) allocation, ultimately relegated to litigation.

To their credit, whatever their motivation, the apparently most responsible parties formed coalitions

(BHC and LPC). They allied to remediate the sites, [22] entitling each to some benefit of the doubt as to the equitable factors and factual uncertainty in allocating R.C. Factual uncertainty suggests a lack of clarity as to PRPs' responsibility for appropriate contribution, a concern addressed over 10 years ago in the court's encouragement of settlement of all claims as the best method of achieving a just resolution. The court has no knowledge of the negotiations between the coalitions and the PRPs. Thus equity cannot be said to favor any party on the issue of contribution.

Each coalition claims contribution to R.C. by potentially responsible parties (PRPs), for which they have the burden of proof. U.S. v. Colorado & Eastern R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995), citing H.R. Rep. No. 99-253 (III), 99th Cong. 1st Sess. 19 (1986), reprinted in, 1986 U.S.C.C.A.N. 2835, 3038, 3042. See U.S. v. R.W. Meyer, Inc., 889 F.2d 1407, 1507-08 (6th Cir.) cert. den., 494 U.S. 1057 (1990). The largest number of such claims have been resolved by agreement or legal disposition, leaving a Special Master (SM), appointed absent a showing of cause to the contrary by the remaining parties, to determine preliminarily the contributions to R.C. By order dated July 21, 1997, William J. Cousins was appointed S.M., one of his duties being to conduct hearings and report his findings as to the lawful contribution to be allocated to any remaining, unresolved PRP, in accordance with CERCLA and particularly 42 U.S.C. §§ 9613 (f) and 9607 (a). The S.M. has now reported, doc. # 3066. The remaining alleged PRPs seek acceptance of the report. The coalitions have taken exception ruled on herein.

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[22] Thirty-two corporations constituted the Beacon Heights coalition and entered into a consent decree for the remediation of that site. Nineteen corporations constituted the Laurel Park coalition and entered into a consent decree for the remediation of that site.

FACTS:

1. PARTIES:

The report springs from the costs identified by the coalitions as to each site. The propriety of the remediation undertaken was not challenged, either as compliant with the consent decree, see 42 U.S.C. § 9622, or the National Contingency Plan. See 42 U.S.C. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(3)(i). As prescribed by CERCLA, the coalitions undertook remediation at the two sites and have incurred costs to remediate each site. Each sought contribution under § 9613(f) from hundreds of defendants, allegedly PRPs as defined by CERCLA based on HW disposal. After a 12 year processing, trial came down to allocation of R.C. to eight municipalities, Naugatuck, Orange, Middlebury, Plymouth, Hamden, Seymour, Westport and New Haven; John Betkowski, Beacon Heights operator from 1950 to 1970; George Clark, owner of Beacon Heights for 7 days in 1970; Jacob Brothers, Inc., disposer of unquantified tires there from 1963-66 and May 1973 to November, 1974; and Zollo Drum Company, Inc., which allegedly disposed of unspecified amounts of HW from 1967 to 1976.

2. BHC COSTS:

BHC claims contributions to its R.C. less a sales tax rebate:

Design/construction:	$24,886,755.66
EPA	595,462.60
Leachate collection/treatment	1,309,267.35
Discharge Permit	6,225.00
Potable water supply	1,369,946.88
Project management	4,648,003.77
Miscellaneous	105,224.40
Testing/Consultants	283,648.23
Property acquisition	468,375.00

BHC asserts expenses related to Non-PRP litigation, penalties, PRP identification and contributions

of $1,910,175.12. Operation and maintenance of the site for thirty (30) years, 1997 to 2027, is claimed to have cost and require further expenditure of $11,947,766. For collection of PRP contributions, legal fees of $2,340,733, S.M. fees of $239,200 and accounting fees of $32,260.55 are claimed.

BHC asserted 386 PRP claims, settled 157 for $7,217,285 and abandoned the rest, except those tried, as unmerited or uncollectible.

3. LPC COSTS:

LPC has presented its costs as follows:

Remediation to date	$20,398,626.51
Design, construction, EPA/DEP oversight, property acquisition	
Projected costs, 6/1/98 to date	
Operation/maintenance of site	$11,564,250.00

It has settled PRP claims for $8,395,887.90 at a cost, including attorneys' fees, of $3,592,258.12 and would credit its net recovery of $4,803,629.78 against its total remediation cost of $31,962,876.51, thus including collection costs.

4. RECOVERABLE AMOUNTS:

The R.C. claimed, except as found otherwise herein, were and are necessary and consistent with the National Contingency Plan.

5. WASTE DISPOSAL:

a) Beacon Heights (BH)

Until 1970 BH was a six acre open dump where waste was mostly burned, reducing waste to under 10% of the volume deposited. The pre-1970 deposits were about 22% of the total to 1979 and after burning amount to under 2% of what remains. Uniroyal and Goodrich were the largest pre-1970 depositors, largely of industrial and chemical wastes.

Beginning in 1970, the Murthas (who have settled with the coalitions, but in amounts which are not reflected

in the record for either site) owned and operated the site, enlarging it to 30 acres and expanding to hundreds of depositors. Some operations were changed in 1970, but it continued to receive HW, some in liquid form from coalition members. Liquid wastes, over 4,000,000 gallons, were entirely the responsibility of BHC members, particularly Uniroyal and B.F. Goodrich, depositors of 56% of the entire disposal. The total BHC volume, liquid and solid, was some 363,914,415 gallons of wastes containing HS subject to CERCLA. P.Ex. 37A. The S.M. found high toxicity (HW content) and a propensity of that waste, particularly in liquid form, to find its way into the site's leachate, a finding documented and sustained.

The volume and character of the settling PRPs' waste is not in the record. Disposal by 64 non-BHC totaled 163,698,879 gallons.

Seven municipalities and four other remaining alleged PRPs, from which contribution is sought, disposed of solid waste at BH as follows:

> i) Hamden's MSW was delivered to Connecticut Resource Recovery Authority (CRRA) which, with DEP approval, arranged transport by Connecticut Waste Processing, Inc. (CWPI) to BH from December 1978 to June 1979, of about 4,770,009 gallons. CRRA and CWPI, both sued as PRPs, partly based on that MSW, have seemingly settled, apparently providing BHC with some contribution for Hamden's MSW. To allocate a contribution to Hamden for that MSW without allowance for other contributions for the same MSW would be inequitable. BHC allocates Hamden 2.1040%.

ii) Naugatuck incinerated waste and, through Murtha, sent an estimated 9,922,184 gallons of MSW to BH from 1976 to 1979 when LP closed. BHC allocates it 4.3766%.

iii) New Haven, through the CRRA with DEP approval, sent about 6,473,583 gallons, from December 1978 to June 1979. Its MSW is subject to the observations in i) above. BHC allocates New Haven 2.8554%.

iv) Orange disposed of MSW, commercial and construction waste, through Murtha, from 1970 to 1979, an estimated 20,235,349 gallons. BHC allocates it 8.9256%.

v) Plymouth, a town of under 12,000 residents, through Murtha, may have deposited about 4,449,088 gallons or 33,400 cu. yds. BHC allocates it 1.9625%.

vi) Seymour, through Murtha, deposited MSW at BH from 1973-79, 13,166,688 gallons. BHC allocates it 5.8077%.

vii) Westport disposed of 73,116,636 gallons, 361,999 cu. yds., of MSW from 1971-77, to which BHC allocates 32.35%. As the MSW deposited from 1967 through 1969 was burned, the residual volume would be 287,066 cu. yds.

viii) Betkoski operated the site before 1970 as a burn operation. That resulted in the waste deposited being reduced to under 2%

of the volume. There was no evidence of precise measurement of waste deposited other than that of the BHC, nor could the HS be calculated precisely. Four of BHC contributed about 50% of the volume, of which 4.3% was liquid.

ix) George Clark owned BH for .06% of its operation time.

x) Jacob Bros. Inc. scrapped tires at BH from 1963-66, when they were burned, and 1973-74. An HS is a constituent of tires. The total deposit was estimated to be 1440 tons of which 75%, 1080 tons, were burned to a residue of 108 tons. The total remaining on site then would be 468 tons.

xi) Zollo Drum incorporated in 1986. Successor liability was claimed in order to attribute liability for drums bought, cleaned and sold. Waste was not handled. If deemed to have transported waste otherwise generated, including by BHC members, which contributions therefor have been achieved, BHC would allocate Zollo .6832%.

b) Laurel Park

Waste was burned at LP until 1964, substantially reducing residual volume and HS. Before LP was finally closed, its negative environmental impact caused significant concern to Naugatuck, Middlebury, Orange, Seymour and Plymouth officials.

Uniroyal's Chemical Division deposited 76,000,000 pounds of chemical and industrial waste as of 1960 and another 172,000,000 pounds as of 1976, apart from the

waste from its other divisions. Its total waste deposited was 1,642,583 cu. yds. with a hazard factor (used for comparison purposes in the allocation to which LPC members agreed) from .4 to 10. This included large amounts in liquid form but the greater bulk was comparable to MSW. It totaled 77% of the LPC waste at LP. Others in the LPC contributed a total of 657,776 cu. yds. with a hazard factor from .4 to 10. The report found that these substantially contributed to the toxic quality of the leachate. The finding of the amount and quality of LPC HW is documented and is sustained.

The volume and character of the waste of the PRPs who have settled was not placed in the record.

The defendants' waste at LP was as follows:

i) Naugatuck deposited MSW, governmental waste and bulky waste at LP, except in 1976 to 1979, when it was closed, and in 1983 to 1984. Until 1967 it was uncompacted and became fully compacted in 1969. It paid Murtha a flat fee. No volume or weight was measured. From CRRA's weight in 1989, LPC extrapolated per annum weight for 1950, estimating a total from 1950 to 1987 of 174,487 tons of compacted waste, or 581,624 cu. yds., and 129,834 tons of uncompacted waste, or 2,596,694 cu.yds., of which 2,115,531 cu. yds. were burned and thus reduced in volume by 90%. Naugatuck's MSW was not limited to household waste and thus was likely to include more HS than the average. Bulky waste and construction waste was not shown to contain HS. LPC would allocate 31% of the R.C. to Naugatuck.

ii) Orange's MSW was calculated to be 177,407 cu. yds. to which LPC would allocate 3.4% of R.C.

iii) Plymouth disposed of 107,054 to 151,398 cu. yds of MSW, a mean of 129,226, for which LPC would allocate 2.9% of R.C.

iv) Seymour disposed of 143,577 cu. yds of compacted and 47,651 cu. yds. of uncompacted MSW to which LPC would allocate 3.2% of R.C.

v) Middlebury disposed of 228,854 cu.yds of compacted and 32,442 cu. yds. of uncompacted MSW to which LPC would allocate 4.7%

6. QUALITY OF WASTE

The same facts apply in this respect to both sites. The report finds that the form, nature, toxic quality, mobility, magnitude, and HS of the coalitions' waste disposed of at the two sites, with the resulting release or threatened release of HS from the sites, required remediation (i.e. response costs) as undertaken by the coalitions under their respective consent decrees, a finding fully documented in the record and sustained.

The S.M. found that the characterization of municipalities' MSW as a major source of HS by the coalitions' expert, Dr. Brown, was not credible. It was found that HS existent in MSW, a generic fact, are not present in pure form. Rather, they are constituent elements in consumer products and remain in minute residue in containers after the products with such elements are removed and used. It was also found per Dr. Brown that, at most, hazardous substances were .1 to .4% by

volume of MSW. No empirical MSW study was done at either site, even by sample. Though statistically sound, the generic approach leaves open the question of whether a municipality's MSW conforms to a national profile. HS in a product or container could not be released and/or find its way into leachate except by deterioration of the product or container and preservation of the HS. There was no evidence that any MSW HS could be demonstrated to follow that course and process and thus be traced to a presence in the leachate or ground water from either site. Dr. Brown offered the theory that generically all MSW contained HS which found their way out of a disposal site eventually to present a CERCLA problem. He did not find, nor see as necessary, a causal connection between a disposal of HS in MSW and a movement thereof from the site as to necessitate remediation. Mr. White did consider it. Such movement and relation to remediation he took as a given, a proposal rejected by the S.M. as a question of fact. Although the coalitions, through proof of liability based on the existence of HS in MSW, have no burden of proving HS from a specific source is released from the site, in the face of PRPs' evidence challenging such a finding, the absence of countering evidence is appropriate in considering claims for contribution.

7. CONVERSION:

One cubic yard equals 201.98 gallons. One pound of solid waste equals .75 gallon (1650 gallons per ton). One pound of liquid waste equals .12 gallon (264 gallons per ton).

DISCUSSION:

1. CERCLA LIABILITY

Faced with a history of indiscriminate disposal of HW with monumental environmental damage, Congress opted for a scheme of absolute liability for disposers of HW. The EPA first identifies parties to be responsible for the cost of a site's remediation in an administrative

proceeding. As is the case here, one or more responsible parties can, by consent, assume responsibility for clean up of a Superfund site. The coalitions have done so here. They have further settled their claim of responsibility as to the Murthas. 42 U.S.C.§9613(f) authorized claims for contribution by BHC and LPC against any party who disposed of HW at a site (PRP). That assured the maximum assumption and imposition of liability for a site's remediation. Equitable factors were to be the standard for allocation of R.C. among those responsible.

The S.M. noted the claims for contribution as based on disposal by each third party defendant of wastes containing HS designated by EPA. Clearly disposal of HS was treated as a given. The report does not discuss liability. Under CERCLA, disposal of HS constitutes liability. The report does not focus on liability, nor does it ultimately excuse the alleged PRPs for their involvement. Rather it focuses on how much of R.C. each PRP should be allocated in accordance with § 9613(f). R.C. may be allocated "among liable parties." Id. Allocation can only follow a finding of liability. The suggestion that the S.M. improperly failed to find liability is
without merit.

As a remedial statute CERCLA is construed liberally and in furtherance of its corrective purposes. B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (Murtha II). It set criteria for identification of those to be liable to correct the contamination, and when found, absolute liability applied. B.F. Goodrich v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992)(Murtha I).

2. EQUITABLE FACTORS:

The report discusses equitable factors applied in determining allocations as to the PRPs, in keeping with "such equitable factors as the court determines are appropriate." Id. As illustrated in its dealing with the question of releasability, one who is liable by reason of the

disposal of HS possibly may not be required to pay damages when the cost apportionment phase of the litigation is reached. Murtha II, 99 F.3d at 517. The S.M. considered a number of equitable factors and found that no R.C. should be allocated to the PRPs before him. The factors discussed in the report and rejection of PRP contribution based thereon, will be reviewed seriatim.

The exhaustive and selective analysis of data and methods of apportionment demonstrates that no formula is scientifically nor objectively invulnerable to criticism. A reasonably fair allocation considering all relevant equitable factors complies with CERCLA's purpose and language. If the remaining parties are not satisfied with the result, they had their opportunity to devise a negotiated allocation which they were told, over ten years ago, would be more agreeable than a court allocation subject to the frailties in selecting and weighing the myriad of asserted equitable factors.

a) A finding of the presence of HS in MSW could be based on Dr. Brown's testimony or on the testimony of the PRPs' experts. Dr. Brown did not inspect either site. He was not a chemist and did no empirical studies of MSW. He relied on reports of HS in MSW from a number of municipalities. He concluded that all MSW contains HS. He did not consider any steps taken by municipalities to preclude HS from their MSW. Regulation of MSW and any steps taken to control HS in MSW led Dr. Brown to note that the composition of particular MSW streams may not correlate to a national profile of MSW. Any such regulation, though not controlling nor treated by the S.M. as such, and neither uniform nor all-encompassing over the period of waste disposal in question, was properly considered as an equitable factor relevant to the claimed presence of HS in MSW. The unproven claim that all MSW should be treated as comporting to a nationwide profile of MSW without

inquiry as to the makeup of particular MSW is a legitimate equitable factor. Also to be considered is evidence that MSW-only landfills have generated HS in leachate.

b) MSW arguably contained HS in products essentially consumed but present in minuscule residues in the product containers. There was no evidence of the propensity or prospect of such HS escaping from the containers nor of the rate or susceptibility of various types of containers to degrade and permit the escape of such HS. There was evidence of HS being affected by interaction with other elements as to alter their character as HS. All these, and related, questions pertaining to HS in MSW in such form, and the answers, or lack of answers, were legitimately considered by the SM as relevant equitable factors. Such HS hardly impacts, environmentally, as greatly as highly concentrated HS in liquid form that almost immediately is "released" to migrate into ground water and into leachate. Such forms of HS would, equitably, warrant varied allocation of R.C.

c) MSW can be made up of many materials, some of which are in turn absorbent of liquids present. Without observation of the MSW of a particular community, the percentage of absorbent material, and thus the capacity of the MSW to hold liquid carrying HS, cannot be assessed. The evidence bearing on such questions is relevant to equitable consideration of its impact on remediation.

d) As a constituent element in "routinely distributed consumer products" HS would only be a remediation factor if it came to be released, or was a threat to be released. If such products did not break down into their constituent elements in a free state, then it could be found that such were not released nor a threat thereof at any particular point in time. To assess the role of such HS in the immediate or foreseeable need for remediation, evidence as to such products rate of and propensity to

breakdown would be pertinent. Absent such evidence, it would be difficult to determine the actual or threatened release of HS. Through products subject to degradation or decomposition, elements which constitute HS were properly found to attenuate or to form, with other elements, new compounds which did not migrate into underground water nor off the site. Comparing PRPs' HS's impact on leachate with that of plaintiffs' HS is a valid equitable consideration. See U.S. v. Alcan Aluminum Corp., 964 F.2d 252, 267-71 (3d. Cir. 1992); U.S. v Alcan Aluminum Corp., 990 F.2d 711, 717, 722 (2d. Cir 1993). A "release," for CERCLA purposes, does not require HS to find its way into leachate. The evidence does not permit the conclusion that HS from one or more particular waste streams caused or necessitated specific remediation. Causation is not a factor as to liability but it is a valid equitable factor in determining R.C. allocation.

e) Contribution liability is imposed based on the claimed contributor being liable or potentially liable under § 9607(a). The latter casts liability on a person in relation to a site in terms of a "release, or a threatened release [of HS] which causes the incurrence of response costs." Id. Assessment of evidence offered as to a claim for contribution, including the credibility of the witnesses who are the source of such evidence, is a proper factor to be considered. It is clear that the S.M. accepted the premise that inclusion of some HS in MSW mandates a finding of liability. See Murtha I, 958 F.2d at 1201. It does not mandate allocation of R.C. to one found liable. The circumstances of disposal by one found liable is an appropriately considered equitable factor.

f) A factor discussed in the report is mobility of HS. One seeking contribution is not obliged to prove that the HS found in leachate from the site includes HS deposited by a particular source, to be entitled to a contribution from that source. The report notes Dr.

Brown's view that it is adequate to require a particular PRP to contribute if its HS shows in the leachate from the site. The PRPs offered evidence which disputed their HS' mobility. That raised credibility issues which the SM resolved in favor of the PRPs' witnesses, as part of his consideration of what R.C. should be allocated to remaining PRPs. Rejection of Dr. Brown's opinion was not a basis for finding that the PRPs were not liable as the S.M. did not so find. Using the term mobility as reflective of the propensity of HS in the MSW to migrate into the ground water and off the sites, the S.M. credited the evidence of the PRPs' witnesses and not the views of Dr. Brown in this respect. That credibility assessment and a finding as to mobility of HS in MSW were equitable factors properly considered in deciding the issue of contribution. These factors would not preclude a contribution for want of proof that a PRP's HS necessitated particular remediation and its attendant cost.

g) The report discusses whether PRPs caused incurrence of R.C. It suggests that though a person may dispose of HS at a site, if that HS does not cause incurrence of R.C., equitably that person should not be allocated part of those costs. Put another way, the report suggests that based on the evidence, the coalitions' HS were of a nature and extent to have been released, or to have threatened a release such that remediation of those HS, alone, necessitated the full response costs incurred or to be incurred. Based on that finding, the SM did not allocate a share of the R.C. to the PRPs. Crediting the PRPs' experts and not Dr. Brown, the SM found that HS of the PRPs did not add to the R.C. The coalitions' HS was found to have necessitated the full R.C. Any R.C. attributable to PRPs' HS was found to constitute a lesser included cost in the total cost necessary to correct the coalitions' contamination. That was properly considered, though not a determinative factor.

h) The reasons cited for the SM's rejection of the views of Dr. Brown are found to be relevant in the trier of the facts' determination of Dr. Brown's credibility.

i) At most the record reflects a concentration of HS in MSW of .1% to .4%. The consideration, by the S.M., of that concentration as opposed to the nature, form and extent of the coalitions' HS was proper as an equitable factor. See Acushnet Co. v. Coaters Inc., 948 F.Supp 128, 141 (D.Mass. 1996). A thimble full of HS would have far less negative environmental impact than would a gallon. The disposer of the thimble full, though properly found to be liable, could properly be deemed to have caused such negligible negative environmental impact as to be obliged to contribute to the R.C. on the basis of a comparison between the impact caused by his HS and that of others. Comparison of the amount of PRP HS to that disposed of by the coalitions is a valid and properly considered equitable factor. The coalitions' claims that the PRPs's HS "added to the concentration of contaminates" assumed, without basis, according to the S.M., that the addition, no matter the amount, added to the necessary remediation and in turn to the R.C. BHC and LPC were not obliged to prove that HS of one liable under CERCLA caused specific remediation or R.C. Murtha II, 99 F.3d at 526. Evidence that the remediation necessitated by the coalitions' HS was not altered nor the cost thereof increased by PRPs' HS was not improperly considered by the S.M. as an equitable factor in determining PRPs' contribution.

j) The foundation of the opinions of Dr. Brown was properly considered in assessing the weight of his testimony on the asserted allocation of R.C. to PRPs. His assumption that characteristics of the seepage from several sites was attributable to MSW, without further inquiry or facts on which to verify the attribution, was a valid consideration in assessing the validity of Dr. Brown's

attribution of the same characteristics to all seepage from MSW.

k) The reasoning, logic, fairness and substantiation of the views on allocation expressed in support of the coalitions' claims for contribution, as opposed to the same factors as they underlay the PRPs' evidence is found to be a properly considered equitable factor bearing on allocation of R.C. to the PRPs.

1) Congress, in CERCLA, fixed the process for identifying responsible parties and allocating the cost of remediation of site contamination among them. It further designated the courts, and litigation, as the place and procedure by which disputes as to such identification and allocation were to be decided. It might well be said that such designation was ill considered since imprecision of proof of who dumped what many years ago precludes accurate findings of fact by courts. Parties' cost to resolve contribution claims is the result of Congress' forum designation and is not a properly considered equitable factor.

m) The members of the coalitions, by consent to the decrees by which they agreed to remediate the sites, acquiesced in the basis for that responsibility as set forth in CERCLA. The definition of HW in 42 U.S.C. § 6903(5) was properly considered as an equitable factor as it constituted a determination of the character of the waste disposed of at the sites by the coalition members. That in turn was properly considered in comparing what the coalitions were liable for, from the wastes they disposed of, with what the PRPs were liable for, based on what they disposed of at the sites.

n) John Betkoski operated BH until 1970. He accepted waste from three small municipalities and from BHC members. He burned the waste, substantially reducing volume and tending to dissipate HS. The finding that no R.C. should be allocated to him is substantiated in

the record based on the limited MSW deposited, the comparisons of MSW HS with BHC's HS and the burning as it affected any HS absorbed by the waste burned. It is also consistent with equity because any allocation to him would be substantially for remediation of HS of which BHC was the source. Although he is not excused from liability based on that fact, 42 U.S.C. 9607(b), and could be required to contribute to assure full payment of remediation cost, consideration of his being a recipient, not a source of HS is justified.

o) George Clark's one week ownership of BH permitted deposit of so little HS as to justify allocation to him of no R.C.

p) Jacobs Bros. Inc.'s disposal of tires, which were burned from 1963 to 1966 but were landfilled from 1973 to 1974, was found not to warrant allocation of R.C. on the basis of the more reliable evidence that the tires, though containing toluene, would not decompose and release HS, which would be likely to cause incurrence of response costs. That finding is sustained by the record and will stand.

q) BHC claims contribution from Zollo Drum Company, Inc. on the basis of successor liability. In its proposed findings of fact, BHC facilely moves between references to the entity which existed first and that which succeeded. It does not describe the factual scenario involved. As not contradicted, the S.M.'s finding in this regard is sustained. Richard Zollo, as a sole proprietorship, did business under an apparent trade name, Zollo Drum Company until November 1, 1984 when he sold all of the assets of the business to his son, Anthony. The Bill of Sale described the business sold as "dealing of steel and fiber containers for over fifteen years." Zollo Drum Company, Inc. was incorporated on January 31, 1986. In a manner not disclosed, nor specified by the S.M., the corporation in turn acquired the business and the assets which Anthony

purchased. The business originally conducted by Richard Zollo was two-fold: a) the purchase, reconditioning and resale of fiber and steel drums; and b) waste haulage. BHC's claims included the fact that "[i]n 1984, a month or two prior to the asset sale, Zollo discontinued its waste hauling business." BHC Proposed Findings of Fact, dated Sept. 18, 1998, ¶ 322. That was consistent with the Bill of Sale. Anthony and Zollo Drum Company, Inc., conducted the same operation as when he purchased the assets, the removal for reconditioning of empty steel and fiber drums. Id., ¶ 321.

The S.M. recites the 5 factors required for determining successor liability under the substantial continuity test. See Murtha II, 99 F.3d at 519. Thus he applied the proper test. Since the claim for contribution arises from the waste disposal, the corporation would only be liable if it was the successor to an entity in the waste disposal business. Richard terminated that activity before Anthony, and then the corporation, owned and operated the business. The corporation did not carry on the waste business which gives rise to the claim for contribution. Its employees did not do the same jobs, the processes were not the same and it did not perform the same services for the same customers. While it might be found to be a successor to Richard Zollo's drum business, successor liability is not properly assigned when the successor is not in the business on which the claim of liability is based. Accordingly, the S.M.'s finding of no liability on the part of Zollo Drum Company, Inc. is sustained.

r) That products containing HS were not listed as HS by EPA is not controlling, Id. at 517-18, and is not an equitable factor to be considered in allocation. EPA'S Municipal Settlement Policy, Pl's. Ex. 33, states a lesser toxicity in MSW, citing 42 U.S.C. § 6901 et seq. See 63 Fed. Reg. 8197-98, Feb. 18, 1997.

s) The cap on waste functions to alleviate HS finding its way into leachate. The extent of the cap, and cost, is partly related to the residual waste volume required to be covered.

t) Contributions are claimed to include an amount to avoid plaintiffs' full absorption of so-called "orphan shares." Such shares are uncollectible amounts properly allocated to PRPs. The merits of this claim need not be considered as an equitable factor since no amounts have been allocated to "orphans". By determining contribution toward the coalitions' incurred, proper R.C., less contributions realized from settlements, no gap in what the coalitions realized in collectible contributions arises.

The S.M. dealt with the issue of cost allocation. Liability was assumed and was properly treated in accordance with the principles articulated in Murtha II which held that disposal of HS in any form automatically cloaked with liability the several categories of persons involved with the disposal. See Murtha I, 958 F.2d at 1200-01; Murtha II, 99 F.3d at 515-16. Nor is causation of a release of HS required for imposition of liability. Murtha II, 99 F.3d at 516-17. Both coalitions' objections charge the SM with incorrectly applying legal principles to the determination of liability. The report is not understood to have discussed liability but rather to have assumed it and dealt with the question of allocation of R.C. to PRPs whose liability was a given. Determination of an allocation is made on a different basis than a determination of liability. A person "may still be held liable, even though that defendant may not be required to pay damages when the cost apportionment phase of the litigation is reached." Murtha II, 99 F.3d at 517. Nothing in Murtha I nor Murtha II precludes consideration of the factors discussed by the S.M. as discussed herein. The trial court decisions there reviewed pertained to liability, not cost allocation.

Different considerations apply to liability determination and cost apportionment. CERCLA's remedial purpose required a broad reach in the field of waste disposal. The number of players, their different roles, the shifting relationships among different players and disposal sites, and the lack of focus on knowing, recording and tracing the components of waste, all created a potential uncertainty as to who did what and with what knowledge. Congress' intent was to insure rectification of the environmental disaster in the face of substantial factual uncertainty. Thus it imposed liability broadly on any person having a role in the chain of movement of HS from origin to resting place in a waste disposal facility. Having done so, it nonetheless recognized a range of culpability of those thus liable dependent on an array of factors which would vary greatly from case to case. Indeed it recognized that EPA's determination of responsibility of a limited number of persons should not be the end of the matter. Thus in § 9613 (f) it created a scheme by which anyone who could be shown to have had a role in the disposal of HS could be tapped for contribution. Without § 9613(f), liability would probably have been joint and several, thereby potentially treating each liable person in parity. The single homeowner who was a source of minuscule traces of HS would fare no differently than the source of a large volume of unadulterated HS. An immediate originator of HS would also have no means of distributing ultimate responsibility by collecting contributions from all with a role in creating the environmental problem.

The purpose of 9613 (f) was maximum fairness by distributing the cost of necessary remediation among those liable in proportion to their role in bringing about a site's environmental condition. It recognized that degrees of sharing the cost was appropriate as there were degrees of contribution to the problem. To achieve just and fair sharing, it invoked the concept and principles of equity. It

also recognized that there would be a myriad of factors that might be properly considered in apportioning R.C. responsibility. It specified that apportionment be determined based on equitable factors. That delegated to courts the responsibility for deciding an equitable apportionment. Courts were given broad discretion to decide what factors were properly to be considered and in what order and weight, guided by the obligation to achieve fair, just, and equitable, allocations. Thus, determination of liability maximized the ability to correct the problem. Allocation of R.C. to all who were responsible would insure that the total cost would be distributed in relation to the degree of participation in creating the problem, i.e. equitably. Thus a PRP can escape an allocation of costs by proof that his contribution, of HS, "when mixed with other hazardous wastes, did not contribute to the release and the cleanup costs that followed, or contributed at most to only a divisible portion of the harm." United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d. Cir. 1993).

3. ALLOCATION:

Relying on the equitable factors discussed above, the S.M. concluded that there should be no allocation of R.C. to individual PRPs nor to the municipal PRPs. The coalitions object on the basis that the record does not sustain that conclusion, citing their expert testimony on the subject, which the S.M. could decline to credit. PRPs' experts' evidence suggests that some allocation is appropriate. The record reflects what is probably inevitable. The complex makeup of waste, which the record does not measure with any degree of precision, the lack of precise records and the fading of memories precludes any fact finder from an assuredly accurate assessment of the impact on the toxicity of a site of any party who had a role in HS finding its way there. Complaints of flawed analyses by the experts reflect an

inability to guarantee precision in an allocation. It is more so for courts seeking equity based on imprecise evidence of waste components and differing views of experts on the appropriate degree of responsibility of the many sources of HS. As plaintiffs note, the court warned, well over 10 years ago, that trial of claims for contribution is fraught with uncertainty that a decision could be assuredly equitable. Congress advanced some factors to guide allocation:

i) A PRP's ability to prove a distinction of its release, discharge or disposal of HW;
ii) The amount of a PRP's HW;
iii) The degree of toxicity of a PRP's HW;
iv) The degree of involvement of a PRP in the generation, transportation, treatment, storage or disposal of HW;
v) The degree of care of the parties with respect to HW in relation to the characteristics of the HW;
vi) The cooperation of PRPs with officials in prevention of harm to public health or the environment.

125 Cong. Rec. 26,779, 26,781 (1980). The foregoing can not result in a precise allocation formula. The following reflect appropriate factors in determining equitable allocations of R.C. for each site:

a) The total volume of a PRP's waste deposited at the site.
b) The portion of the waste constituting HS.
c) The form of the HS: liquid or solid.
d) Whether the HS is deposited in free form or as an element or component of a substance or product.
e) Decomposition required before HS which is a component or otherwise contained would be released

("releasibility") and any effect of interaction with other matter on its character as HS.

f) The mobility of the HS, i.e. its permeability and prospect of flowing with ground water.

g) Whether a cap would have remediated a waste stream(s).

h) Whether leachate treatment. was required to remediate particular HS.

i) Whether there are factors requiring different caps, i.e. for HS in industrial waste as opposed to HS in MSW. If so whether sources of industrial waste properly bear part of a MSW cap cost plus all the premium cap cost.

k) Whether HS is validly evaluated in terms of harm to the environment (HTE). Were values assigned valid? Whether HTE should be simply summed for all types of HS contained in a waste stream or averaged based on the ratings of the several HS contained.

l) Was HS releasibility validly formulated and applied by use of one factor for all of several types of HS in a waste stream?

m) Is contamination of a site properly assessed as an entirety only or segmented in relation to the different HS present or both?

n) Is a segregated assessment of HS in leachate valid? Is responsibility for leachate treatment properly allocated only to the sources of industrial waste?

o) As the witnesses discussed allocation as between members of the coalition, as a distinct group, and others, not limited to the PRPs whose liability is now before the court, whether the latter is subject to a discount for the HS in all other waste deposited.

p) The contributions sought are properly limited to lawfully recoverable R.C. less all PRP settlements to date. Murtha's settlement should be deducted but the amount is not in the record.

q) Despite no guarantee that each MSW container was full or partially full, a volume discount need not be calculated, as such would apply equally to the PRPs and the coalition members.

r) As the volume and character of the waste of settling PRPs was not placed in the record it cannot be determined whether their payments reflect equitable contributions toward R.C. Nor can such be used for comparison with the allocations to the remaining PRPs. By deduction from the coalitions' total R.C., the settlement amounts properly reflect the residual R.C. to be allocated between the coalitions and the remaining PRPs.

s) Naugatuck contributed $1,200,000 to construction of a water line to property vulnerable to LP leachate and $400,000 for a sewer line for LP leachate treatment. LP's condition may impair tax collection but, as the town allowed creation of the condition by its land use policy, a credit for lost tax income is inappropriate. The contribution of $325,000 to BHC through Naugatuck Treatment Company is credited.

t) Plymouth is not blessed with a high tax base and has a high tax rate. Contribution for the MSW it deposited is proper.

u) The Murthas settled with payments made to each coalition.

4. RECOVERABLE COSTS:

The challenge to BHC's claimed costs is resolved as follows:

a) Mr. Pirnie's fees, $86,817.66, were reasonably incurred to develop a suitable remediation plan and are reasonable R.C.

b) Not all the work of Putnam, Hayes & Bartlett was shown to be necessary to identify and substantiate claims against PRPs and would appear to be partially duplicative. BHC apparently started but stopped segregating the charges as might have identified the

recoverable portion. Two-thirds of the charges claimed are deemed sufficiently shown to be reasonable R.C., i.e. $300,094.72.

c) The work of HRP, $23,697.09, and the photocopying expense related to PRP identification, $23,628., are recoverable R.C.

d) Geo-Con contracted for work required by the remediation plan approved by EPA. It was the low bidder. BHC disputed Geo-Con's work performance and replaced it with O&G Industries which had been a sub-contractor. BHC settled Geo-Con's unpaid services claim and paid it $13,664,362.90. BHC has shown that the work was required by the remediation plan. The payment is a R.C.

e) The payment to O&G did cover rectification of washouts and erosion. It is not shown that O&G's work was substandard nor noncompliant with its contract. Even if such were the case, there is no reason why BHC should bear all the expense as such work is a risk of the job. The payment to O&G, $8,909,318.60, is a R.C.

f) The change of personnel and companies engaged in management of the project is noted against a background of EPA dissatisfaction with the sediment control and erosion, allegedly the responsibility of the project management. Some aspects of the deficiency surfaced when BHC was replacing the contractor which coincided with adverse weather. The extra cost to correct deficiencies in the design and/or the work are not shown to be attributable to BHC but are found to be risks of work performance not unusual to a project such as was undertaken here. The extra cost is a reasonable RC.

g) The payment to Engineering Management is found to be for necessary services and a reasonable R.C.

h) The settlement with Bethany falls within corrective work discussed in e) above and is a reasonable R.C.

i) The Swan property acquisition, to accommodate sedimentation and erosion problems, is found to have been reasonably necessary, not attributable to BHC and a reasonable R.C.

j) The EPA penalty is not found to have been reasonably incurred by BHC to remediate the site. It would be contrary to CERCLA to assess PRPs for liquidated damages attributable to BHC.

k) As related to the EPA penalty, the Hale & Dorr fee is not a reasonably incurred R.C.

1) The work of Shumway & Merle is found to have been incurred to formulate and contract for the work to accomplish remediation of the site and is thus a reasonable R.C.

m) The fee of Pepe & Hazard cannot be allocated indirectly to the PRPs as an offset to other PRP settlements. See Key Tronic Corporation v. United States, 511 U.S. 809 (1994).

n) Pepe & Hazard's fees for the Geo-Con and Wehran litigation did not constitute a reasonably incurred R:C.

p) Eric Schwartz' fee for work on the Geo-Con litigation did not constitute a reasonably incurred R.C.

q) Coopers & Lybrand's work related to the Murtha settlement is not a reasonably incurred R.C.

r) Operation and Maintenance (O & M) costs are remediative in nature and recoverable R.C. Analytical Consulting Tech's charge, per the proposed finding of fact ($736 and $9,059 equal $9,795), is proper R.C. Lack of invoices for all of CCA's, Land-Tech Remedial's and Conestoga-Rovers' charges do not preclude their full charges as R.C. The GeoSyntec charges for August, November and December, $16,100.70 are apparently not documented and thus are not R.C.

s) Contingent O & M costs, discounted, are conceded by PRPs and will be included in the amount of $5,314,485.

BHC's R.C. total $40,664,785.77. Allowing for its settlements from other PRPs ($7,218,285), except the Murthas whose payment is not reflected in the record, the net R.C. are $33,446,500.

The challenge to LPC's claimed R.C. is resolved as follows:

a) The leachate alleviation, $538, 470, is found to be an R. C.

b) Malcolm-Pirnie's charges, $50,118 and $521,989.34, are R. C.

c) The documentation of the LPC access agreement cost, the agreement itself, is sufficient for the $349, 641 expense as an R. C.

d) The HRP documentation, supplemented by testimony, suffices to warrant its charge, $19,354, as an R.C.

e) Inadequate documentation precludes a fence cost of $10,000.

f) Inadequate documentation precludes a water line cost.

g) Bankers Trust's documented cost of $21,059 is a valid R.C.

h) Langan's disputed quantum meruit claim, $350,000, is not an incurred R.C.

i) All Langan's work was not or could not be used. CPA' s work constituted some duplication of Langan's charges, which cannot be precisely measured. To find that terminating Langan saved money would be speculative. Reduced by one-fourth, to $1,517,056.58, Langan's charge is deemed a reasonable R.C.

j) Naugatuck Glass's cost, $19,800 is adequately documented.

k) The Hess charge ($2,175) is adequately substantiated.

l) A Uniroyal employee charge is not adequately substantiated.

m) Naugatuck Treatment Company's leachate treatment charge is unreasonable and arbitrary. It is a wholly owned subsidiary of Uniroyal, one of the LPC. Evidence of a range up to $6.00 per thousand gallons is credited, reducing the claim to $351,006.36. future O & M costs can be allocated in accordance with the formula decreed herein.

o) Smith-Kajima' cost of $325,000, over its claimed cost of $5,918,580.82, a valid R.C., is found to have been a settlement of a claim for additional compensation of $600,000 for contracted work due to changed conditions. As such, the $325,000 is a valid R.C.

p) The EPA charge, in excess of $244,288.64, as unresolved and contested, is not an R.C.

q) Five year review costs are R.C. For years 3-5, the $25,333, undisputed, will be allocated; for years 6-30, the undisputed, discounted $8,008 per year, totaling $200,200 will be allocated.

r) The following are R.C. in accordance with Key Tronic Corp., 511 U.S. 809, as not incurred to prosecute contribution liability but in furtherance of remediation:

1) Fuss & O'Neill's documented charge, $162,722.33.
2) K.W. Brown, $25,094.
3) Shumway & Merle, technical and contract services, deemed reasonably to be $274,730.50 (2/3 x $412,095.75).
4) Austin Carey, $94,941,75, extent deemed for contracts.

5) Cohen & Channin, $13,081.82, for contracts.

s) The following are adequately shown to be valid R.C. Though subcontractors to Conestoga-Rover, the charges are not claimed to have been covered by CRA's contract price:

1) Advance Testing.
2) Aquifer Drilling.
3) Baron Consulting.
4) Caroccio-Covill.
5) Connecticut Ecosystems.
6) Cuisimano Electric.
7) ENSR.
8) GeoSyntec: Consultants, Testing, Jaworski.
9) Soil and Material Testing.
10) Special Testing Laboratories.

t) The following are found to be valid R.C., over objection

1) Bechtel Environment, Inc., $94,540.53.
2) Cagno Property acquisition, $450,000.
3) ERM Northeast, $21,537.99.
4) Labriola & Labriola, $7,102.
5) Legette, Brashears & Graham, $85,654.32.
6) Hess, $2,175.
7) Naugatuck Glass Co., $19,800.
8) Paul Associates, $13,580.
9) Perrotti Property acquisition, $100,000.
10) Southern New England telephone, $19,770.

11) Technical Committee, $15,838.37 (as documented, less a donation, Uniroyal purchase and coin purchase).
12) Northeast Utilities, $6,608.47.
13) Conestoga-Rovers & Assoc., $2,093,776.25.

u) All other claims discussed in PRPs' Proposed Finding of Fact, ¶¶ 397-512, 9/18/98, are not recoverable R.C., even if treated as offsets to recovered contributions, as follows:

1) American Arbitration Association.
2) American Speed Printing.
3) Austin Carey, Jr. (not technical or contract service).
4) Corporate Courier Service.
5) Edwards & Angell.
6) Cummings & Lockwood.
7) Court costs.
8) Deputy Sheriffs.
9) Legal Copy Specialists.
10) Niziankiewicz & Miller.
11) Pierce Atwood,
12) PIP Printing.
13) Robinson & Cole
14) Shumway & Merle, dispute and common counsel services.
15) Special Master Fund.
16) AMEC KWBES.
17) Siegel & O'Connor.
18) Trowbridge, Schoolcraft et.al.
19) Tyler, Cooper & Alcorn
20) To complete legal services.

21) LPC Construction Oversight (apparently a Uniroyal employee) as not justified and duplicative.
22) R.J. Guerrera
23) R.L. O'Neill

LPC's R.C. total $13,865,428.91. Allowing for payments of settling PRPs ($8,395,887.90), other than the Murthas, the net R.C. are $5,469,541.01.

Weighing all of the factors as discussed above, contributions shall be made by the municipalities as follows:

To R.C. for BH:

a) Naugatuck: $371,465.05 (.0111), minus $325,000 that involved Naugatuck Treatment Company, a net of $46,465.05.
b) Orange: $756,320.30 (.0226) .
c) Plymouth: $224,218.85 (.0067).
d) Seymour: $508,675.60 (.0152).
e) Westport: $2,178,604.05 (.0651).
f) Hamden: $90,356.85 (.0027).
g) New Haven: $150,594.75 (.0045).

The percentages (in parentheses) were derived in accordance herewith and from:

i) The total volume deposited.
ii) The volume of MSW from each municipality.
iii) A toxicity factor for BHC's liquid and industrial waste as contrasted with its members' and the municipalities' MSW.
iv) A discount factor for Hamden and New Haven to allow for a CRRA settlement for the same MSW.

The percentages would be applicable to future incurred R.C. with a credit in the form of an offset against such R.C.

for the Murthas' settlement if the amount of such is placed in the record.

To R.C. for LP, $5,469,541 plus $1,600,000 (see ¶ 2)a) below:

a) Naugatuck: $303,283.31 (.0429) less the payments it has made for the water line, $1,200,000, and the sewer line, $400,000, leaving Naugatuck with a credit of $1,296,716.69. The $1,600,000 must be added to LPC's R. C ., to be allocated to all PRPs. If merely credited to contributions allocated to Naugatuck, then LPC would bear the full cost of those projects.

b) Orange: $256,624.34 (.0363).

c) Plymouth: $187,342.84 (.0265).

d) Seymour: $219,155.79 (.0310).

e) Middlebury: $339,337.97 (.0480).

The percentages (in parentheses) were derived in accordance herewith and from:

i) The total volume deposited.

ii) Each municipalities' volume of deposited MSW.

iii) A toxicity factor for LPC's liquid and industrial waste as contrasted with its members' and the municipalities' MSW.

The percentages would be applicable to future incurred R.C. with a credit in the form of an offset against such R.C. for the Murthas' settlement if the amount of such is placed in the record.

CONCLUSION:

To the extent that the foregoing is consistent with the Report of the S.M., it is accepted, ratified and adopted. To the extent the forgoing is not so consistent, this

memorandum shall constitute the findings and judgment of the court.

SO ORDERED.

Dated at New Haven, Connecticut, September 22, 1999.

"s/Peter C. Dorsey"
Peter C. Dorsey United States
District Judge

FILED
APR 13 __ AM '00
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH CO ET AL :

-vs- :

HAROLD MURTHA, ET AL : DOCKET NO. N87-52(PCD)

: (ALL CONSOLIDATED CASES)

CADBURY BEVERAGES, INC. ET AL :

-vs-

A.J. OSTER, ET AL

RULING ON PENDING MOTIONS

BHC's and LPC's motions for reconsideration and prejudgment interest and defendants' motions and objections, doc. #s 3109, 3112, 3114, 3116, 3117, 3132, 3121 (denominated a Memorandum but characterized a motion), 3123, 3126, are GRANTED to the extent consistent with this ruling and discussed seriatim.

A. BHC's Motion for Reconsideration and Relief

1. In the Ruling on Objections to the Report of the SM (Ruling and Report, respectively), the record was suggested as not reflecting BHC's settlement with the Murthas and their related entities. BHC showed, in the record, unnoticed by the court in the mass of material involved, that the Murthas settled BHC's claims for $2,020,212.35. Ex. P-325. BHC's Appendix to Proposed Findings of Fact, dated September 18, 1998, totaled the settlements with other PRP's at $7,218,285, including the Murthas'. BHC's net response costs (R.C.) toward which it was found entitled to contribution, was reduced by that amount. As the Murthas' settlement had been accounted for, BHC shall not be subject to a further offset for the Murthas' settlement in future claims for contribution, as provided in the Ruling. As thus amended, said provision will stand as not duplicative of RC contributions.

2. The record suggested that BHC's claim against Middlebury had been resolved and the Ruling did not decide its contribution. It appears that claim should have been resolved, based on the factual submissions. Middlebury, from November 1977 to June 1979, was the source of 19,796 cu. yds. of MSW sent to BH. Using the same factors as noted in the Ruling, p. 35, BHC is awarded a contribution from Middlebury per F.3 below.

3. BHC objects to Naugatuck's credit for $325,000, paid to it by the Naugatuck Treatment Company (NTC) as a settlement. The record reflects that the Town built a water treatment plant and contracted with NTC to operate it. NTC by contract received revenues from treatment users, paid operating expenses and held any net in escrow for capital expenditures. NTC was entitled to an incentive payment out of any net over $500,000. NTC apparently settled on the basis of a claimed obligation arising from the treatment plant operation. The payment to BHC came from the escrow which constituted Town funds.

Testimony to the forgoing came from Mr. Dlugokecki, Town counsel, who reviewed the records, including contracts which were in evidence. His information on contract performance as to revenue, expenses and the escrow account came from the manager of NTC, a Uniroyal subsidiary.

Whether payment was made with knowledge of Town officials, does not resolve BHC's argument. The question is not the propriety of the payment, whatever the Town may have argued elsewhere, but rather whose money was used. As BHC has not shown to the contrary, Town funds are found to have been used. Thus the credit is proper.

4. BHC claims prejudgment interest as mandated by 42 U.S.C. §9607(o)(4), incorrectly cited for §9607(a)(4) which provides:

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specific amount is demanded in writing, or (ii) the date of the expenditure concerned.

BHC seeks contribution as authorized by § 9613(f), not by § 9607(a). Authority is granted to seek contribution from those "liable or potentially liable under section 9607(a)." Thus the scope of those liable for contribution and what is recoverable, i.e. "response costs," are defined by §9607(a). However, this action is brought under § 9613(f). Prejudgment interest is claimed on the authority of Bancamerica Commercial Corporation v. Mosher Steel of Kansas, Inc., 100 F.3d 792 (10th Cir., 1996), which held the interest mandate of § 9607(a) applicable to contributions. The Second Circuit has not spoken on the issue. Bancamerica noted that cost apportionment actions "must be brought under the rubric of § 9613(f)," id. at 800. The

phrase "under the rubric of" does not alter the fact that only § 9613 (f) provides for contribution. Although § 9613(f) does not create new liabilities, it is dubious to say that § 9613(f) "simply confirms the right [] to obtain contribution from other potentially liable persons."

Nonetheless, BHC argues that prejudgment interest is mandated by §9607(a)(4). The municipalities characterize it as "in the equitable discretion of the court as set forth in [§9613 (f)]." Surreply dated November 24, 1999. Recoverable R.C. includes "all costs of . . . remedial action." § 9607(a)(4). The cost of money is not unreasonably a cost attached to the expense of remediation. Prejudgment interest will be awarded as equitable. The issue of its being mandatory will wait another day.

Interest authorized by § 9607(a)(4) accrues from the later of the date of demand of a specified amount and the date of the expenditure. BHC's reliance on the amended complaint, in which contribution was first asserted against municipal defendants, misses the mark. It did not demand payment of a specified amount from either the remaining municipal defendants as a group nor from an individual municipal defendant. A substantial part of the R.C. found reasonable were expended after the claim against the municipalities was pleaded ($33,340,303 out of $35,371,401). It would be inappropriate to award BHC the cost of money before the money was actually laid out.

BHC's expenditures range from 1990 to 1996, as itemized in affidavits of Gary Gifford, disputed only as to reasonableness and in some instances documentation. Exs. K and L, Mem. of October 12, 1999. An accrual date has been calculated by using median expenditure dates, weighted by the amount expended for each account. A median date of the accounts' median expenditure dates was calculated from BHC's earliest date under § 9607(a)(4),

April, 1990, which works out to June, 1994. The rates of interest specified in § 9607 (a) (4) are:

a)	6/94-9/95	5.63%
b)	10/95-9/96	5.86%
c)	10/96-9/97	5.69%
d)	10/97-9/98	5.61%
e)	10/98-9/99	4.53%

Each contribution will be increased by interest using those rates.

5. BHC's R.C. is recalculated to accommodate the questions raised in its response dated October 27, 1999, pp. 3-6. As the tape attached at App. A reflects, changes are made as follows:

a) Item X.B results in a net cost added of $300,094.72.

b) Items XI.B□F are omitted.

c) Item XII.A. The original claim of $529,834 (BHC's post trial brief, 9/18/98) was reduced as duplicative by $231,465.48 to $298,268.52, in return reduced $16,100 (Ruling p. 31, r), to a net $282,168.52.

d) Item XII.C. is entered as a net of $5,314,485.

Items raised in defendants' Reply of November 10, 1999, are resolved, per App. A, reflecting recoverable R.C. found to total $39,818,648.26. Reduced by other PRP's settlements of $7,218,385, contributions are calculated on BHC's net RC, $32,600,263.26

B. LPC Motion to Reconsider Ruling on Report

1. Uniroyal, a member of LPC, paid the water line cost. It was not paid by LPC nor was it shown to be a R.C. compliant with the National Contingency Plan (NCP). The State bore the other half of the expense, an obligation not consistent with the expense as part of NCP remediation. Mr. Klaiber's evidence went to the

expenditure amount, not to its nature. It was not a proven R.C. despite testimony of LPC's payment, without documentation.

2. The State required a leachate collection system of Laurel Park, an entity not otherwise identified. It dates to 1983, old even by the standards of this case. As a State requirement, it is not shown to be part of the NCP. Uniroyal purportedly agreed to bear part of the cost but has not shown it came within 9607 (a) (4) (A) - (D) . Nor has LPC proven that the claim was not within the R.C. allowed for leachate alleviation.

3. While the record is still bereft of documentary proof of the expenditure of $10,000 for a fence undisputedly ordered, LPC is not held to such evidence to meet its burden of proof. As there is no showing to discredit Mr. Leach's testimony and the SM did not reject the claim, it is found to constitute a proper R.C.

4. The expense of site supervision may have been requested by EPA, but that does not necessarily constitute it as a reasonably incurred R.C. It clearly duplicated the general contractor's work per the testimony of Mr. Iyer. It is not shown to have facilitated the remediation significantly. Its disallowance will stand.

5. LPC showed EPA's additional claim of $584,052 for oversight, a contested charge. Resolution of EPA's claims, including those other than this item, does not result in this item being reasonably incurred, and thus a recoverable R.C.

6. Item (s)(8), Ruling P. 34, should read: GeoSyntec Consultants, Geo Testing, and Jaworski Geotech.

7. CRA's billing of an additional $238,049 exceeded the amount found to be a valid R.C. It is not shown to represent a cost of reasonably necessary remediation. Prior to the presentation of that bill, the additional cost was estimated at $114,500. The record does

not reflect the work purportedly covered by that cost as justified as a valid R.C. nor why the bill doubled the estimate. A claim exceeding an estimate does not preclude its validity but it does call for an explanation such that validity as an R.C. can be factually determined. Such has not been provided here.

8. Defendants' challenge to the supplemental claim of LPC, that they had no chance to cross examine the evidence offered, is without merit. The order permitting LPC's additional evidence afforded defendants the opportunity to counter LPC's proffer in recognition of defendants' right to respond. Defendants did not request an opportunity to examine the source of the documents or witnesses to their content. Furthermore, LPC's documentary evidence would normally be countered by other evidence as opposed to cross-examination.
The asserted additional $350,000 for Smith Kajima was allowed at the initial review of the record as a resolution of billing above the claim for $5,918,580. The $350,000 is concededly included in the bill of Smith Kajima of $866,674. The disputed amount which was compromised by the $350,000 settlement remains unclear. If all or part of the $866,674 was settled by the $350,000 then the remaining $516,674 would not represent a valid charge properly considered as R.C. LPC has the burden of proof in that regard and has not shown that $516,674, or part thereof, represented an unpaid or uncompromised expense.

9. The claim for leachate treatment cost properly notes LPC's burden of proving incurral of an expense and consistency of the work or service involved with the NCP. Neither were the basis in the ruling for allowing only part of the amounts claimed. LPC's burden includes proof of the reasonableness of the amount of the expense. LPC claimed the cost based on a negotiated rate which was suspect because the vendor, Naugatuck

Treatment Company, was a wholly owned subsidiary of Uniroyal, a member of LPC. That does not suggest an arms length negotiation. Based on all the evidence, it was found that the rate charged was not proven to have been reasonable, indeed to the contrary. The rate allowed was based on all the relevant evidence and constituted the extent LPC was found to have proven a reasonable R.C. in terms of cost.

10. The amount allowed for Remedial Investigation/Feasibility Study (RI/FS) costs was derived from the parties' claims of fact. LPC points to testimony and exhibits which go beyond the claims and are said to sustain a finding for the entire amount claimed, $791,092. Confusion was created by listing that claim for RI/FS and also a claim for pre RI/FS. The Ruling, p.34, allowed $50,118 and $521,989, and $219,984 as non-duplicated RI/FS, with the result that the full $791,092 is counted as R.C.

11. Regarding LPC's Item 12, the items for Alderman & Alderman ($369.02) and Naugatuck Town Clerk ($580) were not allowed as not proven to be valid R.C. All other items were allowed and included.

12. In the mass of material in the record, it has been found that the R.C. found allowable, $13,865,428.91, is arithmetically in error which has not been possible to trace. The correct total, with the corrections allowed above, is $15,508,648.27. That figure is derived from claims in LPC's Attachments to its Proposed Findings dated September 18, 1998, as ruled on in the face of objections in the Ruling. A copy of the tape on which the calculation is made is attached as App. B. The item $244,288.64 is deleted as ruled out.

13. The offset to accommodate Murtha's settlement is vacated as to future contributions to LPC per A. 1. The $2,196,045 paid to LPC was and should be credited against the R.C. incurred.

14. LPC's R.C. are reduced by $8,568,387.90 including the Watertown settlement of $172,500. LPC's recoverable R.C. is $6,940,260.37.

15. The same burning factor, 90%, was used to determine all residual volume.

16. LPC notes that the $1,600,000 credited against Naugatuck's contribution was, without contradiction, paid not by Naugatuck but by the State. LPC asks deletion of the credit as a windfall to the Town if its contribution is reduced by an amount it did not pay. Naugatuck's argument that the matter was decided and should not be changed is without merit. The credit was allowed without knowledge of the State's actual payment. Disallowing the credit does not result in a windfall to LPC. If Naugatuck's contribution is reduced by an amount it has not paid, LPC would be left with costs actually incurred which Naugatuck equitably should assume. The credit is disallowed. See 42 U.S.C. § 9614(b).

17. LPC's claim for prejudgment interest is found to be valid per A.4 above. Its claim dates from August 18, 1995, an accrual date not disputed by defendants for costs incurred prior to that date. See Defs.' Memorandum of October 27, 1998, at p. 5. While the information may be contained in Exhibits, such as Pl.'s Ex. 244, LPC does not compile the expenses incurred as of August 18, 1995, nor of the period over which, or dates on which, it incurred individual allowed R.C. from which interest accrual can be calculated. The court will not specify the method of proof but a summary, for each R.C. payee, of date(s) of payment would be helpful. The accrual proposed by LPC would generate interest before costs were incurred, an unjust result. Defendants' contributions will be recalculated, based hereon, with interest from accrual dates calculated as for BHC, per A.4 above, if dates of R.C. incurral can be tabulated.

C. Naugatuck moves to revise the Ruling by crediting it with the $351,006.36 allowed as a R.C. of LPC because it is a cost for the processing of leachate at Naugatuck's treatment plant. It argues that payments for such treatment belong to it and are paid to NTC as the plant operator. Although Naugatuck must operate the plant and receive and process the leachate, its argument is without merit. LPC pays to NTC which remits or credits the net to Naugatuck thereby relieving it, partly, of the cost of plant operation, maintenance and improvement. It cannot claim reimbursement for the line cost which the State and Uniroyal paid or the payment to NTC as it incurs no leachate processing cost otherwise unreimbursed. See Exs. K and L to Naugatuck's Mem. dated October 13 , 1999. A credit to Naugatuck will leave LPC without a contribution to which it is entitled. Such a credit is neither shown to be logical nor equitable. The payment will not be credited.

D. Defendants reargue the evidence in contradicting the MSW volumes attributable to them. The findings reflect credit given to all the evidence and the burdens of proof. While there was no documentation of all MSW, unquestionably defendants shipped MSW which was calculated on a reconstructed basis. Pointing to their evidence and arguing for a recalculation is not warranted.

E. Defendants' argument that, absent articulated finding of validity of an R.C., no award should be deemed made, is without merit. The Ruling decided articulated objections to the Report. R.C. not specifically challenged were deemed uncontested except on decided grounds, i.e. validity under § 9607 (a) as R.C. BHC's recoverable R.C. are flagged (in amount) in App. A.

F. Defendants' six grounds for amending the Ruling are:

1. Murthas' settlement, conceded by all, is and was credited against recoverable RC, $2,020,212 to BHC and $2,196,045 to LPC.
2. The Ruling credited evidence found to be appropriate in calculating equitable contributions. All of the factors discussed in the Ruling were considered in deciding each defendant's contribution. All evidence pertaining to volumes attributable to each defendant was reviewed and weighed in keeping with the appropriate considerations relevant to credibility. Nothing now presented demonstrates any impropriety or lack of consideration of the evidence offered nor do defendants' arguments warrant revisiting the Ruling in this respect.
3. BHC's net R.C., $32,600,263.26, ($39,818,648.26, A.5, reduced by other PRP's settlements of $7,218,385, A.1), is the basis for contributions ordered as to defendants, with interest, per A.4 above and Ruling p. 31, as follows:

a) Middlebury(.0045), $146,701.18 plus $40,078.76=$186,779.94
b) Plymouth(.0067), $218,421.76 plus $59,672.82=$278,094.58
c) Westport(.0651),$2,122,277. plus $579,806.=$2,702,083.23
d) New Haven (.0045) $146,701.18 plus $40078.76=$186,779.94
e) Naugatuck (.0111), $361,862.92 minus $325,000=$36,862.92 plus $10,070.95=$46,933.87
f) Orange(.0226), $736,765.94 plus $201,284.45=$938,050.39

g) Seymour(.0152), $495,524 plus $135377.16=$630,901.16

h) Hamden(.0027), $88,020.71 plus $24,047.26=$112,067.97

4. Defendants' questions as to BHC's R.C. are resolved by the determination set forth in A.5 above and totaled in App. A.

5. Defendants' questions as to LPC's R.C. are resolved by the determination set forth in B.12 above and totaled in App. B.

6. Defendants finally request a rehearing on allocation because the weeks of evidence presented to the SM must be reviewed and evaluated first hand by the court. That claim is contrary to the purpose of the reference to the SM. The record is to be created before the SM. The court's review looks to the existence in the record of substantiation of the findings recommended by the SM. If not substantiated, based on the record created before the SM the court makes its own findings. That is what occurred here. It would be counterproductive for the court to hear, anew, the evidence presented to the SM and inappropriate for a party to have the opportunity to present the matter again. The evidence offered to the SM afforded an adequate opportunity for the parties to present their views. There is no showing of any reason why the court needs anything additional for a "first hand" review and evaluation of the evidence nor that any party was deprived of the opportunity to present fully their case to the SM. Having reviewed all responses to the Report and thus considered all arguments put forth by the parties, no further hearing need be held.

G. The Town of Seymour asserts what its counsel presumes was done in the Ruling on its contribution. The foregoing discussion of the procedure followed and the record was considered will not be repeated. The Town's memorandum refers to the "facts

offered at trial," suggestive of counsel's belief that evidence offered by a party is properly characterized as fact. It is not. The trier decides the facts based on the evidence. That evidence is offered in support of claims of fact does not oblige the trier to credit that evidence. A finding of fact is not erroneous merely because counsel does not agree with it nor if it is contrary to a party's evidence. When, for example, Mr. Vicari testified for the Town and "corrected certain of the responses" of the Town to the UDO, the trier may legitimately credit the responses and reject the correction. An estimate of volume is not necessarily discredited because it was not based on measured MSW. The contribution assigned to Seymour considered the record and resolved conflicts in the evidence as reasonably as possible. The Town now seeks to reargue the evidence. The prediction that reconsideration will result in a finding of fact, and in turn an assigned contribution agreeable to the Town, does not constitute a valid basis for the motion. The Town has not shown, nor claimed, that it did not have a full opportunity to place in the record any evidence it wished. No other valid ground for a rehearing being shown, the Town's motion for reconsideration is granted. Its motion for rehearing is denied.

H. Conclusion

LPC may move to supplement the record to permit a finding of an interest accrual date on or before May 5, 2000. The parties shall prepare and submit a form of Judgment on or before May 5, 2000. In the event that the parties cannot agree on the wording of such judgment, plaintiffs shall submit separate draft judgments.

SO ORDERED.

Dated at New Haven, Connecticut, April 12, 2000 .

"s/ Peter C. Dorsey"
Peter C. Dorsey
United States District Judge

APPENDIX A

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86,817.66+
1032,723.00+
13664362.90+
8809,318.60+
785,386.92+
595,462.60+
575,000.00+
330,227.75+
192,591.60+
210,998.00+
450.00+
6,225.00+
1258,690.73+
91,982.64+
19,273.51+
95,291.80+
1599,938.71+
2851,961.08+
95,838.18+
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4,298.00+
39,018.25+
20,130.00+
9,607.50+
4,637.00+
18,834.76+
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1,875.00+
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300,094.72+
23,628.00+
182,498.00+
282,168.52+
99,282.00+
5314,485.00+
73,431.07+
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438,999.00-
239,200.00+
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APPENDIX B

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9769,499.47+
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21,537.99
162,722.33
1517,156.58
85,654.32
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253,881.93+
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3,500.00+
2,175.00+
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5918,580.82+
325,000.00+
2093,776.25+
244,288.64+

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3,500.00
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
KEVIN F. ROWE, CLERK
BY
DEPUTY CLERK
(DATE AND TIME ILLEGIBLE)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH CO., ET AL	:	
-vs-	:	
HAROLD MURTHA, ET AL	:	Docket No. 3:87CV52(PCD) Consolidated cases
-vs-		
RISDON CORPORATION	:	
CADBURY BEVERAGES, INC., ET AL	:	
-vs-	:	Docket No. 3:95CV01547 (PCD)
A.J. OSTER CO., ET AL	:	

ORDER RE APPOINTMENT OF SPECIAL MASTER; MEDIATION, FACT FINDING AND REPORT

No good cause having been presented at the hearing on an Order to Show Cause, held on June 27, 1997, all remaining actions for contribution to the remediation

costs at the Beacon Heights and Laurel Park sites will be resolved in proceedings described in the Order to Show Cause, docket entry number 2650.

Accordingly it is ORDERED:

William J. Cousins, Esq., is hereby appointed Special Master to conduct such further proceedings as to each remaining claim for contribution and is authorized to issue such orders as necessary thereto subject to review by the court as provided by law.

Mediation of each remaining claim for contribution will be scheduled forthwith by the Special Master in order to reach an accommodation between the parties to the extent reasonably possible. Such hearings will be governed by the standards established by the Society of Professionals in Dispute resolution (SPIDR) in cooperation with the American Arbitrations Association (AAA). If requested by any party, the Special Master may file with the court a Notice of settlement which shall entitle any interested party, on non-compliance with the settlement agreed to, to a judgment enforcing the agreement.

When mediation proves to be unlikely to produce a resolution of a claim for contribution, a hearing will be scheduled by the Special Master promptly for the purpose of his finding facts, drawing conclusion and recommending what, if any, contribution the involved Third Party Defendant, or potentially responsible party, should be required to make under CERCLA as it has been interpreted by the Second Circuit Court of Appeals. Reasonably substantiated claims for additional discovery shall be decided by the Special Master subject to appeal to the court. The findings and recommendations will be governed by CERLA, the Federal Rules of Evidence and Due Process and any other applicable law. The hearing shall be recorded. During the fact finding process, there will be no ex parte communication with the Special Master. The Special Master may promulgate rules for

orderly scheduling and presentation of claims and submission of proposed findings of fact, conclusions and recommended contribution allocations with the basis therefor.

When all remaining claims for contribution have been resolved by mediation or have been heard, and in any event no later than six months from the date of this order, the Special Master shall have concluded the proceedings prescribed herein and shall submit his report to the court setting forth his findings of fact and conclusions based solely on the record, and recommendation as to the contribution, if any, each Third Party Defendant or potentially responsible party should make to the remediation costs at each site, as applicable. The report shall recite the factors on which a recommended equitable allocation of the remediation cost as to a Third Party Defendant or potentially responsible party is based. The report should make no reference to any aspect of the mediation proceedings or communications incident thereto.

The success of mediation depends on the acknowledgment by each party that the decision after a hearing cannot be predicted. That uncertainty arises from the "equitable factors" to be applied by the Court as "appropriate" in accordance with CERCLA §113f. Mediation is also dependent on a realistic assessment of evidence likely to be produced, its weight and probative quality as it bears on the equitable allocation of the remediation costs at each site.

In making his findings, the Special Master shall consider the total reasonable remediation cost for each site, the contributions toward the cost at each site from those potentially responsible parties who have settled claims for contribution and the proper allocation of the costs to the consortium members who are responsible for the site remediation pursuant to consent decrees, such that when

the process is completed the entire remediation cost for each site will have been allocated among all parties found responsible.

Any objection to the findings and recommendations of the Special Master or any aspect of the proceedings shall be filed in court, with the record of the hearing before the Special Master, within twenty-one (21) days of the date of the Special Master's report. Any party interested in a claim as to which an objection is filed shall file any response to the objection with any other relevant part of the record.

Any objection will be decided de novo on the legal issues presented in the documents filed in relation thereto. Any factual objection will be decided on whether the finding or recommendation is clearly erroneous based on the record before the Special Master.

The two consortiums and all remaining potentially responsible parties shall arrange a reasonable fee with the Special Master commensurate with his services in the mediation and hearing of each claim for contribution as applicable.

SO ORDERED.

Dated at New Haven, Connecticut, July 31, 1997.

"s/Peter C. Dorsey"
Peter C. Dorsey
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
FILED AT NEW HAVEN
3/2/1999
KEVIN F. ROWE, CLERK
BY LORI (LAST NAME ILLEGIBLE)
DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B . F. GOODRICH ET AL	:	
V.	:	3:87CV52 (PCD)
HAROLD MURTHA ET AL	:	ALL CASES CONSOLIDATED
V.	:	
RISDON ET AL	:	
CADBURY BEVERAGES, INC. ET AL	:	
V.	:	3:95 CV1547 (PCD)
A. J. OSTER ET AL	:	MARCH 1, 1999

REPORT OF SPECIAL MASTER

I. BACKGROUND AND CONTEXT

These findings of fact are hereby reported in accordance with the Order of Reference entered by this

Court and attached hereto as APPENDIX 1. They resolve all of the issues of fact raised in all of the cases which were consolidated into Civil Action No. 87-52 (PCD), filed on February 18, 1987, which became known as B. F. Goodrich et al v. Murtha et al v. Risdon et al. The original complaint in this action is attached hereto as APPENDIX 2, including its Exhibits A & B. It is followed by numerous amended complaints and Third Party Complaints, all framing the same issues concerning the responsibility for the costs of abating the threat to public health created by a condition existing at a waste disposal site known as Beacon Heights, Inc. in the Town of Beacon Falls.

A like set of complaints raising the same issues pertaining to the
condition of the waste disposal site known as Laurel Park, Inc. in the Borough of
Naugatuck followed an initial complaint filed by Uniroyal Chemical Co. on February 25, 1987 against the Murthas, Civil Action No. N-89-67 (PCD). That action was filed after the entry of a Consent Order issued by EPA on May 26, 1985, requiring Uniroyal to undertake a Remedial Investigation and Feasibility Study in preparation for an ultimate Remedial Action Plan eventually promulgated by EPA. This complaint was followed by a series of amended complaints and Third Party Complaints and the institution of Civil Action N0. 3 95 CV 1547 (PCD) on August 4, 1995 and entitled Cadbury Beverages, Inc. vs. A. J. Oster Co. The Cadbury complaint names the same parties as those who were awaiting the decision of the Court of Appeals on an appeal from a Summary Judgment entered by this Court in their favor. This complaint is based on the extraordinary assumption that the already entered judgments would be set aside by the Court of Appeals.

All of these actions, originally against some 2,000 Third Parties, arose during the conduct of administrative enforcement proceedings by EPA which were instituted in

February, 1981 and were concluded by a Record of Decision in the Beacon Heights matter on September 30, 1985 and in the Laurel Park matter on June 30, 1988. These administrative proceedings collected evidence in hearings subject to public notice and comments and appeal under the Administrative Procedure Act. No appeals were taken to test the records in these proceedings so that the facts found therein are unrebutted. The records in these proceedings are entered as full exhibits in the hearings in fact under the Order of Reference noted above for the facts found therein.

The use of both Beacon Heights and Laurel Park for the disposal of the waste by-products of the industrial enterprises conducted by all of the Third Party Plaintiffs was initiated by Uniroyal. The Laurel Park site background is described in what is known as the Folz Report. The initiation of Beacon Heights is described in the testimony taken of John Betkoski. Both sites came to be owned and operated by the Murtha interests who are enumerated in the complaint contained in Appendix 2. The Beacon Heights site was initiated by Uniroyal when its own private dump in Beacon Falls was covered by the construction of the relocated state highway, Route 8.

APPENDIX 3 is a set of reports taken from the Record of the Administrative Enforcement Proceedings. It reveals that from 1947 until 1960, Uniroyal alone disposed of between 5,000 and 7,000 55-gallon drums of chemical wastes and that, during that time, "as much as possible" of this waste was burned periodically. From 1947 through 1959 the Murthas hauled away 76,937,350 pounds of chemical waste. From 1960 to 1976, the waste was 172,352,660 pounds, or over 86 thousand tons from Uniroyal alone.

Ultimately, some thirty-two large industrial corporations at Beacon Heights and some nineteen corporations at Laurel Park formed coalitions and entered

Consent Decrees at each site in the cases pending in this Court to avoid the consequences of joint and several liability. They then pursued actions against the unrelated and unorganized Third Party Defendants as individuals known to have disposed of individual wastestreams at both sites. These actions, brought by organized Third Party Plaintffs, seek to recover from each of the individual' Third Party Defendants what they claim is the respective share of the cost each has caused to be incurred by the Third Party Plaintiffs in complying with their particular Consent Decree.

In general, the Third Party Plaintiffs are major corporations located in the industrial corridor of the Naugatuck River Valley extending from its confluence with the Housatonic River and extending into northern Connecticut. The wastes consist of by-products of their manufacturing process.

In general, the Third Party Defendants are individual householders, neighborhood stores, fraternal organizations and municipalities, located in this industrial corridor. Each of them disposed of wastes at either or both sites. The types of wastes disposed of by them are generally described by them in compliances with the Uniform Discovery Orders issued by this Court. APPENDIX 4 is a compilation of some of these compliances and also serves to describe the nature of the Third Party Defendants who have been sued.

Over the twelve years of this litigation, many of the Third Party Defendants were released from these claims on the payment of nominal sums or with no payment at all, thus escaping the transactional expenses involved, including extensive use of the appellate process, and saving the Third Party Plaintiffs costs which would exceed any possible recovery. Indeed, many entered settlements during the hearings assigned under the Order of Reference.

The Order of Reference comes after the Court of Appeals returned these cases for trial of the issues of fact it found to be raised by the proffered expert testimony of Kirk Wye Brown, Ph.D. on behalf of the Third Party Plaintiffs. It was originally offered to defeat the Summary Judgments entered for the Third Party Defendants and the denial of the Summary Judgments sought by the Third Party Plaintiffs. This decision by the Court of Appeals was the last of three occasions on which its attention was called to these cases.

II. THE ISSUES

The proceedings under the Order of Reference were conducted first as a mediation effort to engage the parties in an allocation among themselves such as that contemplated by 42 USC Section 9722(3) which provides for NBAR non-binding allocation of responsibility. Falling agreement, the Order provided for the resolution of all issues of fact by hearings. This report of findings of fact determines whether or not any or all of the Third Party Defendants disposed of EPA listed and/or designated hazardous substances "from which there is a release, or a threatened release which causes the incurrence of response costs" per 42 USC Section 9607 (a); and, whether this Court should "allocate response costs among liable parties using such equitable factors as the court determines are appropriate" per 42 USC Section 9613 (f).

The claims of the Third Party Plaintiffs at both sites are that "routinely distributed consumer products" were disposed of by each and every Third Party Defendant; that they are composed of chemical constituents which, in their free state, are EPA listed and/or designated hazardous substances; that these products decomposed in the landfill and released their chemical constituents, incurring a share of the costs undertaken by the Third Party Plaintiffs.

They are the claims originally made as early as 1987 without the expert advice of Dr. Brown. He was

engaged in 1994 to defeat motions for summary judgment by the Third Party Defendants by raising a question of fact. The list of consumer products he relies upon are found in APPENDIX 5.

The original Murtha Defendants listed in the complaint in Appendix 2 escaped from any contribution claims by entering a Consent Decree on February 13, 1990, which immunizes them from contribution claims by the terms of the Act. The wisdom of this move, from their point of view, is demonstrated by testimony taken in these proceedings from John England and Thomas Pregman, the sanitary engineers who had the most contact with the Murtha management at both sites. Both testified that neither site was in compliance with the Connecticut Public Health Code or the regulations of the Department of Environmental Protection except in response to cease and desist orders. They witnessed disposal of liquid chemical wastes in tank trucks and in 55-gallon drums over a matrix of ordinary solid waste. But they also observed liquid chemicals disposed of in lagoons or holding ponds at both sites and the pollution of surface streams at both sites. England testified that both sites were the worst-managed sites among the worst top 10% in the State.

England holds a B.S. degree in Geology and an M.S. in Environmental Geology earned at the University of Massachusetts. Pregman holds a B.S. degree in Biology earned at the University of Connecticut. Both first served as sanitary engineers during the time that the Connecticut State Department of Health directed them to enforce any complaints of violations of the Public Health Code and then under the Department of Environmental Protection when it was created in 1973.

With the adoption of the Connecticut Solid Waste Management Act and the Federal Resource Conservation and Recovery Act in 1976, the wastes disposed of by the Third Party Plaintiffs in these cases were classified as unfit

for disposal in land and, as such, barred from disposal in these two sites. At the same time, municipal dumps, used to dispose of wastes publicly generated within the boundaries of each municipality, were phased out by the legal requirement that landfills were to be licensed by the Connecticut Department of Environmental Protection and governed by regulations to assure safe and sanitary disposal. At various times, mostly starting in 1976, these two sites began to serve the market for the disposal of municipal solid waste as the local dumps began to close.

The disposal of waste in this manner gave birth to the term "municipal solid waste". This term has no definition which is applicable universally to the wastestreams of each and every municipality. Its components vary with the demographic makeup of the community which generates it. See "Characterization of Municipal Solid Waste in the United States; 1990 Update" offered as an exhibit in these proceedings by Dr. Brown. It contains the following caveat:

> "Readers should note that this report characterizes the municipal solid wastestreams of the nation as a whole. The information presented here may not, therefore, correlate with the individual or state or local estimates of waste generation and management".

It is further specifically noted that in order to characterize a local municipal wastestream one must employ a methodology which is site-specific "in which the individual components of the wastestreams are sampled, sorted and weighed". This methodology makes it possible to determine the percentages of cardboard, paper, garbage, or spent containers of the products listed by Dr. Brown exist in the examined wastestreams. See the pie chart on

Page ES8 of the Characterization Report of EPA referred to above.

No such methodolgy was employed by the Third Party Plaintiffs, nor by Dr. Brown. The failure to do so is significant in view of the 30 years of disposal of liquid and other chemical wastes in these sites by the Third Party Plaintiffs compared to the 2 to 9-year period when municipal solid waste was disposed of. It is further heightened in significance by the nature of the hazardous substances alleged to be contained in municipal solid waste. They are chemical constituents which become hazardous substances many years after disposal of the waste, when and if they are released in a free state from whatever residue of the product can be found in their spent containers. Even then, they are not identifiable if the released chemicals bond with others to form new and different compounds.

It must be found as a fact that the testimony of Dr. Robert Ham on the process of degradation is supported by a preponderance of the scientific facts he relied upon. Not only does he describe the bonding of chemicals to form new compounds, he described the releases of constituents as too miniscule in volume to measure. For example, he testified that the release of toluene as a chemical constituent of tires is "infinitesimal" and occurs over centuries. As a retired Professor of Chemistry, his empirical knowledge of the behavior of various forms of waste buried in landfills came from his long experience in studies commissioned by industries who produced them and who sought to assure themselves that they could safely be disposed of in landfills.

The dismissal by Dr. Brown of the vast amount of scientific data accumulated by EPA under 42 USC Section 9604 which created the Agency for Toxic Substances and Disease Registry or the toxicological profiles on substances which affect health, is inexcusable. ATSDR compiled this

data in cooperation with the Food and Drug Administration, National Institute of Health, National Institute of Environmental Health Science, Center for Disease Control, OSHA, Social Security Administration and appropriate local and State health officials, none of whom subscribe to his theory of released chemical constituents. Nor did he consult the work of EPA under 42 USC Section 9611 to study measures for identifying and assessing hazards to which people engaged in remediation refer in order to do their work. Nor did he credit data from field work under 42 USC Section 9660.

In light of Dr. Brown's disdain for these facts, it struck this trier as particularly unscientific of him to dismiss the EPA classification of wastes as hazardous and non-hazardous as "political" rather than scientific.

Dr. Brown described the principal issue in these cases to be the determination of the "fate and mobility" of the hazardous substances disposed of at these sites. Yet, he offers no opinion on the fate of his opined chemical releases except that they "added to the concentration of contaminants found to exist" at these sites. He offers no opinion of the mobility of these released chemical constituents. Nor does he evaluate their fate in combining with other chemicals to form new compounds.

His concentration on the "fate and mobility" of these constituents ignores the fate and mobility of 25-30 years of disposal of highly toxic and mobile wastes at these sites by the Third Party Plaintiffs. These were eventually barred from landfill on the basis of scientific facts ascertained in the administrative process which prove that such waste cannot be disposed of in the ground without posing a clear hazard to public health. In fact, he admitted that he had not examined the records to evaluate the impact of the Third Party Plaintiff waste. This evidence was available to him in the voluminous record of administrative enforcement proceedings. Nor did he

examine the validity of health complaints made by neighbors to each site while it served the Third Party Plaintiffs as early as 1963. See APPENDIX 6. Nor did he offer an opinion on how long before 1981 the conditions existing at both sites constituted a hazard to public health.

These cases, after all, essentially raise a single dispositive issue of fact, i.e. whether the decomposition or degradation of the waste of these Third Party Defendants' results in the release of chemical constituents which incur any part of the costs of remediation undertaken by the Third Party Plaintiffs. This question involves a set of disciplines in geology, hydrogeology, biology and chemistry needed to ascertain, by a reasonable preponderance of the evidence, what the fate and mobility is of these released chemical constituents. It also required empirical sampling of the waste itself.

The essential question is whether, under the conditions of the waste disposal site, they will leave the site, enter the groundwater and eventually pose a danger to public health by the interchange of groundwater with aquifers which supply public drinking water so as to require remediation or pose a threat or impending danger of doing so. It is not a matter of assessing the risk that these releases will reach the aquifers. Rather, it is a matter of proving by some preponderance of the evidence that there is an impending danger or threat that they will.

Testimony on this question was taken from Dr. Brown for the Third Party Plaintiffs and from Robert Ham, Ph.D., Muriel S. Robinette, P.G. and Jeffrey A. Klaiber, P.E. offered by the Third Party Defendants. The qualifications in the disciplines above noted found to be possessed by Kirk Wye Brown, Ph.D. are very significantly less than those of any one of the three experts produced by the Third Party Defendants, nor are they any more relevant than the credentials, for that matter, of the sanitary engineers England and Pregman.

Dr. Brown does not directly answer this essential question referred to above. His conclusion is that these releases contain the same chemicals found to exist by EPA in the contaminants at these sites. Nevertheless, he clearly agrees with the Third Party Defendant experts that the presence of a chemical among the contaminants does not "fingerprint" the substance from which it was released. Obviously, the only source of toluene is not tires. At the same time, all three Third Party Defendant experts opine that the degradation or decomposition releases the constituents but that they do not leave the site but attenuate or form other compounds without affecting the aquifer.

Klaiber and Robinette have, among their credentials, extensive experience in the process of closing sites which have reached capacity in which only general municipal solid waste was disposed of. Out of this empirical background, they describe a closure procedure which simply seals the waste material from conditions that would cause leachate and treats the leachate at the site. They have also observed the state of wastes of this kind and the stage, if any, of degradation. Dr. Brown has no such empirical background. While the experts, including Dr. Brown, do not deny that certain waste materials can, and do, release chemical constituents, all three opine that they do not incur the costs to remediate the damage done by the highly mobile and toxic chemical wastes of the nature disposed of by the Third Party Plaintiffs.

The essential difference between the Brown opinion and the opinions of the Third Party Defendant experts is Brown's honest, but highly theoretical, conviction that all waste of any kind, when buried in the earth, presents a risk of harm that he finds unacceptable but that EPA does not, based on the scientific facts it found in the exercise of its statutory authority. The expertise available to EPA to make this judgment of fact is

overwhelming when compared to the background brought to this task by Dr. Brown, who took no tests, never examined the sites and gained all of his knowledge of the facts he uses to support his opinion by vicarious exposure to materials provided him by counsel for the Third Party Plaintiffs. Despite this expertise, Dr. Brown described EPA's classification of waste as a "political" decision.

It is found as a fact that the control of the leachate generated by waste of the Third Party Defendants at these sites was more than amply accomplished by the extensive control measures required by the Remedial Action Plan to control the movement of the leachate from the waste of the Third Party Plaintiffs. It is not an additional cost but a lesser included cost necessarily incurred by the Third Party Plaintiff waste.

The Third Party Plaintiffs, through Dr. Brown, make an assumption that the disposal of a hazardous substance is proof, by itself, that it incurred the costs of remediation. This, of course, is not consistent with the opinion of the Court of Appeals, nor with the expressed plain English language used in Section 107 which, by explicit language, provides liability for the disposal of hazardous substances "from which there is a release, or a threatened release which causes the incurrence of response costs." Furthermore, how could a court allocate costs to the disposal of a particular waste if there is no evidence to form a basis in fact on how its disposal added to the costs incurred by the Third Party Plaintiffs?

The claims of the Third Party Plaintiffs turn on the theory of Dr. Brown, found to be untenable by this finder of facts, that the disposal in the earth of any one of a number of "routinely distributed" consumer products Dr. Brown lists in his opinion will cause such products to release the chemical elements of which they are made up and thereby incur response costs.

In the first place, he confesses that his theory has not been acceptable to the EPA but explains its refusal to accept it as "political". In effect, he assumes that the President of the United States, the Administrator of Environmental Protection, the Agency for Toxic Substances and Disease Registry, the Commissioner of the Food and Drug Administration, the Directors of the National Institute of Medicine, the National Institute of Health Sciences, the National Institute of Occupational Safety and Health Administration, the Administrator of the Social Security Administration, the Secretary of Transportation and appropriate state and local health officials, have together formed a "political" rather than scientific determination about whether his theory holds water. These are the agencies under the provisions of 42 USC Section 9604(1) charged to determine such a question.

Furthermore, his assessment of the effect of his theory on the environs of Beacon Heights and Laurel Park is totally based upon vicarious knowledge he accumulated from reading such materials as were supplied to him by counsel who engaged him to testify. He never empirically examined either site. In fact, he never visited either site. Although the wastes as each site were exposed during remediation and were available for empirical testing to determine the degree, if any, of decomposition which might have released chemical constituents, no such tests were undertaken.

Such research as he has done includes the reports of tests made at certain other sites said to contain wastes generally described as "municipal solid waste" which show reports of the presence in such water at the time of its disposal of from less than one-tenth of one percent to up to four-tenths of one percent of what are listed hazardous substance. None of these tests attribute these figures to his theory of decomposition and release of chemical constituents, but to substances in the waste identifiable at

the time of disposal. Nor does he offer any evidence to equate the wastes disposed of at Beacon Heights and Laurel Park with the wastes reported to be in the unidentified test sites. Nor does he credit separation at the source of hazardous waste as required by law.

In addition to the studies of published materials on the subject, he undertook to take samples from seeps within landfill sites which he cannot identify except to declare them without evidence, "municipal solid waste only" sites. He submitted these samples to a lab available to him which reported the chemical content of these seeps which he testifies are the same as "the contaminants found to exist" at Beacon Heights and Laurel Park, without further identifying them. He made no effort to determine the effect of the disposal of raw liquid chemicals over a matrix of municipal solid waste on the quality of the leachate at both of these sites. Nor did he account for the long period when the waste was periodically burned in place at both sites.

The sum and substance of the claims of the Third Party Plaintiffs is that "each and every Third Party Defendant" disposed of "one or more of the products" listed in Dr. Brown's list set forth in Appendix 5. However, it must be found as a fact that there is no evidence that any one of the Third Party Defendants disposed of anything more than the spent containers of such products. There is no evidence offered to prove what, if any, residue of the product could be found in the spent container. Nor is any evidence offered to prove the existence of conditions required to cause the decomposition of each of these residues nor the time it takes, under these conditions, for them to release their chemical components. Nor is there any evidence to suggest the volume of the releases from the residue of each of these products, nor which of these residues were disposed of by a particular Third Party Defendant, nor when they may have decomposed. There

is evidence offered by Muriel Robinette for the Third Party Defendants that she has encountered newspapers in waste excavated many years after its disposal which are still legible and not decomposed.

It was the non-negotiable status of the allocation formula used by both Coalitions during the mediation phase of the Order of Reference that caused this Court to proceed to hearings in fact. At both sites, the allocation formula was frankly admitted to be a version of "rough justice", not scientific facts, by the witnesses charged by their clients to develop them.

The allocation witness for the Beacon Heights Coalition was Richard Lane White, engaged when he was a young man, fresh from graduation from a college course he had taken to prepare himself to teach literature. He had no prior employment and had no prior experience in the disposal of wastes and their effect on the environment. His sole experience in the subject came form knowledge he acquired on this job. Yet, he opined that a single copper penny in tons of otherwise benign solid waste would engender the necessity, and contribute to the costs, of "cleaning up" the tons of waste in which it was found.

The allocation witness for the Laurel Park Coalition was a lawyer who represented one of the joint and several liable parties who entered a sharing agreement to avoid the hazard of joint and several liability. His testimony is that his effort was to formulate allocation in such a way as to attract his fellow defendants to join in a sharing agreement. The formulation of the demands on the Third Party defendants was designed to achieve the same goal and was based on notions of "rough justice". Although he consulted experts form time to time in negotiating shares among the Third Party Plaintiffs, none of the experts were called to testify, nor were they consulted on the validity of the Brown theory.

Neither allocation witness identified as a fact what particular waste of any single Third Party Defendant incurred costs. Instead, the general theory of Dr. Brown that virtually all waste is composed of chemical constituents which release when the waste decomposes was used as a basis for assigning costs. It is found as a fact that there is no basis in fact for the allocation to any one of the Third Party Defendants sued as individual entities of any of the costs incurred by the Third Party Plaintiffs.

It is found as a fact, based on the testimony of England and Pregman, whose empirical contact with both sites is intimate over a long period, that the costs incurred in remediation are attributable to the more than twenty-five years of disposal practices by the industrial Third Party Plaintiffs themselves and the poor management of each site by the Murtha interests.

The allocation theory proposed by both Coalitions of Third Party Plaintiffs does not relate the share of the costs assigned to each Third Party Defendant to any measurable quantity of any chemicals claimed to have been released by its wastes. Nor does it explain how the released chemicals added to the costs already incurred by the disposal of the Third Party Plaintiffs' highly toxic chemical wastes over a period of more than twenty-five years.

Nor is there any evidence in the Record of these hearings from which a trier of fact may infer the costs. The claims of each counsel are, quite simply, that dimethyl phthalate, emanating from Neal's Coffee Shop, added to the chemicals already disposed of by their clients, somehow added to the costs. In other words, they attribute unidentified costs to the fact that these releases "added to the concentration of contaminants" found to exist in the leachates at these sites, but do not prove that they entered the groundwater and eventually polluted aquifers.

IV. EQUITABLE FACTORS

It is specifically found as a fact that the costs incurred by the various Third Party Defendants, especially publicly-funded municipalities and individual householders in a twelve-year pursuit by the Third Party Plaintiffs of a cause of action under 42 USC Section 9613, far and away outstrip any conceivable award to the Third Party Plaintiffs even under the Brown theory by an enormous order of magnitude. One need only observe that hundreds of Third Party Defendants were released by the Third Party Plaintiffs on nominal settlement payments or without any payment at all to reach this conclusion. Even if the Brown theory were found to be acceptable, the insignificance of the quantities of constituents allegedly released from any residue in spent containers speaks for itself. It surely presents an equitable factor for the Court in its broad discretion to adopt.

The Court may observe as an equitable factor that publicly generated waste is directed for disposal by law in licensed landfills. Therefore, the only concern of the municipality is to comply with that law. On the other hand, the disposal of privately generated hazardous by-products is a cost of doing business and must be borne by the generator without endangering public health. They must internalize the costs and methods of disposal of the waste by-product in the same manner as they internalize all the other costs of production, which they recover in the sale price of the product.

It might also be considered by the Court as an equitable factor that the term "hazardous waste" is defined in 42 USC Section 6903(5) as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may - (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose

a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed".

It might also consider 42 USC Section 6921 directing ATSDR to identify hazardous wastes which are hazardous "solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or tetragens) at levels in excess of levels which endanger human health". Obviously, the products listed by Dr. Brown were not designated hazardous waste under that section because there were no scientific facts to support such a conclusion.

V. SPECIFIC PARTIES

The parties remaining of the original 2,000 or so to whom shares are attributed by the Third Party Plaintiffs are as follows:

(1) At both Beacon Heights and at Laurel Park:

Borough of Naugatuck	Town of Middlebury
Town of Orange	Town of Plymouth
Town of Seymour	

(2) At Beacon Heights only:

Town of Hamden	City of New Haven
Town of Westport	Jacob Bros., Inc.
John Betkoski	George Clark
Zollo Drum Company, Inc.	

A. MUNICIPAL THIRD PARTY DEFENDANTS

The only issue of fact raised for determination of municipal liability is whether the wastestreams of the Borough of Naugatuck, Town of Middlebury, Town of Orange, Town of Plymouth, Town of Seymour, Town of Hamden, City of New Haven, Town of Westport, decomposed and released chemical constituents which are listed and/or designated by EPA as hazardous substances which incurred response costs.

It is specifically found as a fact that the preponderance of scientific evidence offered by all of the witnesses proves that such releases as may have occurred formed new chemical compounds and, in any event, did not incur response costs. This finding disposes of all of the remaining claims for the Third Party Plaintiffs at Laurel Park and leaves only the Beacon Heights claims against Jacob Bros., Inc., Jon Betkoski, George Clark and Zollo Drum Company, Inc. (which is to be examined individually on the specific grounds of former ownership of the business of Richard Zollo).

B. JOHN BETKOSKI

The claim against John Betkoski is that he operated the Beacon Heights landfill from approximately 1950 to 1970 and, in that capacity, accepted hazardous substances form which there was a release, or threatened release, which causes the incurrence of response costs. It is found as a fact that the evidence is that such wastes as he accepted were the waste by-products, liquid form, of the Third Party Plaintiffs, poured over and absorbed by the ordinary waste which was periodically burned on site. There is no evidence that any share allocable to Betkoski, of the remediation of a condition existing in February, 1981, eleven years after, caused any of the response costs incurred by the Third Party Plaintiffs. See testimony of John Betkoski taken 5/5/98.

C. GEORGE CLARK

The Third Party Defendant George Clark owned this same landfill for a period of one week. The only liability for costs incurred during his ownership would be attributable to him as a successor to Betkoski. No evidence was offered to prove his own personal involvement except that he held ownership for one week.

D. JACOB BROS., INC.

Jacob Bros., Inc. arranged for the disposal of scrap tires at the Beacon Heights site from approximately 1963

through 1966, when they were burned on site, and May, 1973 through November, 1974, when they were merely landfilled. It is claimed that these tires released chemical constituents on the theory offered by Kirk Wye Brown, Ph.D. to which the infirmities apply arising out of the more specific chemical testimony offered by Dr. Ham.

E. ZOLLO DRUM COMPANY, INC.

The Beacon Heights Third Party Plaintiffs claim to have proved that Richard Zollo, dba Zollo Drum Company, Inc., disposed of liquid wastes generated by the Third Party Plaintiffs themselves between 1967 and 1976. They do not seek to recover for these wastes. But somehow Richard Lane White, who was assigned the task of allocating costs, is able to determine that these Zollo disposals from other parties consisted of 1,648,345 gallons of liquid waste and is, therefore, assigned a precise 0.6832 percent of the costs incurred by the Third Party Plaintiffs.

No claim is made against Richard Zollo but, instead, against Zollo Drum Company, Inc. which is a corporation formed on January 31, 1986 by Anthony Zollo who was the sole shareholder. Among the assets of this corporation were such items of personal property and good will acquired by Anthony Zollo from Richard Zollo on November 1, 1984 by a bill of sale which describes "the good will of doing business in the dealing of steel and fiber containers for over fifteen years." And this claim is based upon the allegation that, by this acquisition, Zollo Drum Company, Inc., assumed "successor liability".

The questions of fact raised by such a claim are (1) whether Zollo Drum Company, Inc., maintained the same business as that conducted by Richard Zollo, (2) with the same employees, (3) doing the same jobs, (4) under the same supervisors, working conditions and production processes, and (5) produces the same products for the same customers.

It is found as a fact that Zollo Drum Company, Inc., engaged in no industrial waste hauling, never disposed of any waste at Beacon Heights nor ever possessed a license or permit for hauling waste. Anthony Zollo testified, in a deposition taken January 29, 1993, as follows, in response to questions posed by the Third Party Plaintiffs:

"Q. Could you describe a little more what this drum business was that you operated?

A. I would go to a factory, just some company that would... drums, empty steel drums. I would take them to a reconditioner where they would, I guess by license, clean the, paint them, wash them, and they would go back on the market."

When Anthony Zollo purchased the assets of Richard Zollo dba Zollo Drum Company, he was not engaged in handling or disposing of waste but, rather, in the business of buying and selling drums or containers. Whatever business Zollo Drum Company, Inc., did with customers formerly of Richard Zollo dba Zollo Drum Company, was in buying and selling empty steel and fiber drums. Eventually, Anthony Zollo sold his shares to New England Container Co., of Rhode Island.

In a deposition of Richard Zollo taken on February 7, 1993 by the Third Party Plaintiffs, he testified that he "sold the empty drum part of the business" to his son. He also testified:

"Q. And in the 1960s, would you describe exactly what type of business Zollo Drum was?

A. Originally, I was a dealer in empty steel drums."

There is simply no evidence that Zollo Drum Company, Inc. disposed of any waste at all.

VI SUMMARY

The egregious disregard by Dr. Brown of the scientific facts determined by EPA when it conducted

administrative proceedings (subject to the Administrative Procedure Act), to establish criteria for identifying the characteristics of hazardous waste gives rise to perhaps the most important equitable factor to be considered by this Court.

40 CFR Section 261.10 addresses the scientific facts concerning wastes which "contribute to an increase in mortality" when found, under 40 CFR 261.11, "to be fatal to humans in low doses". It further addresses characteristics which can be "reasonably detected by generators of solid waste through their knowledge of the waste". For example, to charge Neal Hennessey with the knowledge that his waste could possibly release the chemical constituents ascribed to it by Dr. Brown could clearly violate equity, as would a finding that whatever it was it would threaten human health in "low doses".

Finally, this Court should observe that each and every consumer product listed by Dr. Brown as hazardous falls into the category of "any element, compound, mixture, solution or substance" examined in scientific analysis by EPA in extensive administrative records uncontested and, therefore, irrebutable, under the Administrative Procedure Act. Since under the provisions of 42 USC 9601(14) and 42 USC 9602 none of them is designated a "hazardous substance", for this Court to adopt the discredited Brown theory without examining the scientific data upon which EPA acted would be inequitable to the Third Party Defendants. Nor would this Court, by denying the Brown theory, preclude its eventual adoption by EPA in the open, public administrative hearings conducted by it to examine the subject in the future.

"s/William J. Cousins"
William J. Cousins
Special Master

APPENDICES

APP. 1 - ORDER OF REFERENCE, JULY 21, 1997

APP. 2 - COMPLAINT IN CIVIL ACTION N0. 87- 52 (PCD) FILED FEBRUARY 18, 1987

APP. 3 - FOLZ REPORT EXCERPT FROM RECORD OF EPA ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

APP. 4 - COMPILATION OF UDO RESPONSES BY TYPICAL THIRD PARTY DEFENDANTS

APP. 5 - LIST OF ROUTINELY DISTRIBUTED CONSUMER PRODUCTS OFFERED IN EVIDENCE BY DR. BROWN

APP. 6 - JOSEPH N. PERELMUTTER LETTER DATED JUNE 28, 1963

[Due to their length and nature, the appendices to the Special Master's Report have not been reproduced in the appendix to the petition for writ. However, a full copy of the report and all appendices thereto is contained in Volume 4 at Tab 30, pages A2186-A2347 of the Joint Appendix to the appeal to the Second Circuit.]

FILED
AUG 2 3:39 PM '00
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE B.F. GOODRICH CO., ET AL.	:	CIVIL ACTION NO. N-87-52 (ALL CASES)(PCD)
v.	:	
HAROLD MURTHA, ET AL.	:	
CADBURY BEVERAGES, INC., ET AL.	:	
v.	:	
A. J. OSTER, ET AL	:	MAY 5, 2000

JUDGMENT ON DECISION BY THE COURT

This action having been duly heard and a decision having been duly rendered on September 22, 1999 and modified on April 12, 2000,

It is Ordered and Adjudged, for the reasons more particularly set forth in the Court's Ruling dated September 22, 1999 (Doc. # 3107), as modified by the Court's Ruling on Pending Motions dated April 12, 2000 (Doc. #3137), and consistent with the Motion for Relief from Order and for Entry of Judgment dated May 5, 2000 filed by the plaintiffs known in this litigation as the Beacon

Heights Coalition ("Coalition"), that the Coalition recover the following amounts from the following defendants:

a) Town of Middlebury -- $186,779.94
b) City of Westport -- $2,702,083.23
c) City of New Haven -- $186,779.94
d) Borough of Naugatuck - $46,933.87
e) Town of Orange -- $938,050.39
f) Town of Seymour -- $630,901.16
g) Town of Hamden -- $112,067.97

Interest on the foregoing sums shall accrue from the date of this judgment pursuant to 28 U.S.C. § 1961.

It is further ordered and adjudged that the Coalition take nothing against the defendants: Zollo Drum Company, Inc., Jacob Brothers, Inc., George Clark and John Betkoski.

So ordered, dated at New Haven, Connecticut this 27th day of July 2000.

"s/Peter C. Dorsey"
Judge/Clerk of the Court

FILED
AUG 2 3:39 PM '00
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH	:	
v.	:	CIVIL ACTION 3:87CV52 (PCD) Consolidated Cases
HAROLD MURTHA, ET AL	:	

CADBURY BEVERAGES, INC., ET AL	:	
v.	:	Civil Action 3:95CV011547(PCD)
A.J. OSTER	:	

ORDER

Pending is a proposed Judgment proffered by the Laurel Park Coalition (LPC) to finalize the prior orders entered dispositive of LPC's claims for contribution from remaining Municipal Defendants.[23] Those defendants have objected, the grounds for which will be resolved herein.

---

[23] The remaining Municipal Defendants are the Towns of Orange, Seymour and Middlebury and the Borough of Naugatuck.

Defendants renew an objection to the award of prejudgment interest. For the reasons previously recited, the award will stand.

The double count of $1,502,675 in LPC's RC is corrected, the correct amount being $14,005,975.27.

LPC's submission is found to in error, particularly as it compounds interest. Simple interest is found to be $2,892,401.91 to July 31, 2000. Further an award of interest is intended to cover the cost of the money expended by LPC. In fact though found to have been sustained, its costs were reduced by LPC's receipt of the amounts paid in settlement to it. To accommodate that factor, a discount of the interest included in the RC proportionate to the amount received in settlement is in order. That pro ration, .63, is calculated by dividing the settlement amount received, $8,768,387.90, by the allowed RC, $14,005,975.27.

On the basis of the towns' respective contributions, expressed as percentages, LPC is awarded, from each town, calculated as their respective percentages of LPC's net RC, ($14,005,975.27 less $8,768,387.90=$5,237,587.37) plus the recoverable interest, $1,359,428.90 ($2,892,401.91 x .43), a total of $6,597,016.27:

A. Borough of Naugatuck (.0429)	$283,012.00
B. Town of Orange (.0363)	$239,471.69
C. Town of Seymour (.031)	$204,507.50
D. Town of Middlebury (.048)	$316,656.78

SO ORDERED:

Dated at New Haven, Connecticut this 28th day of July, 2000.

"s/Peter C. Dorsey"
PETER C. DORSEY
UNITED STATES DISTRICT JUDGE

FILED
AUG 2 3:39 PM '00
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH :

v. : CIVIL ACTION
3:87CV52 (PCD)

Consolidated Cases
HAROLD MURTHA, ET AL :

CADBURY BEVERAGES,
INC., ET AL :

v. : Civil Action 3:95CV
011547(PCD)

A.J. OSTER :

JUDGMENT

This matter came for consideration before the Honorable Peter C. Dorsey, Senior United States District Judge. A decision has been rendered by rulings, including those of September 22, 1999, April 12, 2000, and July 27, 2000.

It is ORDRED and ADJUDGED that the plaintiffs known as the Beacon Heights Coalition ("BHC") shall

recover the following amounts from the following defendants, inclusive of prejudgment interest:

A.	Town of Middlebury	$186,779.94;
B.	City of Westport	$2,702,083.23;
C.	City of New Haven	$186,779.94;
D.	Borough of Naugatuck	$46,933.87;
E.	Town of Orange	$938,050.39;
F.	Town of Seymour	$630,901.16; and
G.	Town of Hamden	$112,067.97.

It is ORDERED and ADJUDGED that the plaintiffs known as the Laurel Park Coalition ("LPC") shall recover the following amounts from the following defendants, inclusive of prejudgment interest:

A.	Borough of Naugatuck	$283,012.00;
B.	Town of Orange	$239,471.69;
C.	Town of Seymour	$204,507.50; and
D.	Town of Middlebury	$316,656.78.

Interest on the foregoing sums shall accrue from the date of judgment pursuant to 28 U.S.C. § 1961.

It is further ordered and adjudged that both BHC and LPC take nothing form the following defendants: Zollo Drum Company, Inc.; Jacob Brothers, Inc.; George Clark; and John Betkoski.

Dated at New Haven, Connecticut this 2nd day of August, 2000.

KEVIN F. ROWE, Clerk
By

"s/Patricia A. Villano"
Patricia A. Villano
Deputy Clerk

EOD:_____

FILED
2000 DEC 12 A 11:31
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH	)	Civil Action No: 3:87CV52 (PCD)
	)	CONSOLIDATED ASES
Plaintiffs,	)	LEAD CASE
	)	
v.	)	
	)	
HAROLD MURTHA, et al.,	)	
	)	
Defendants.	)	
	)	
----------	)	
	)	
CADBURY BEVERAGES, INC., et al.	)	
	)	Civil Action 3:95CV 1547 (PCD)
Plaintiffs,	)	
	)	
v.	)	
	)	
A.J. OSTER, et al.,	)	
	)	
Defendants.	)	AUGUST 11, 2000

MOTION TO ALTER OR AMEND JUDGMENT

The plaintiffs known as the Laurel Park Coalition move pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment entered by the Court on August 2, 2000 by adding thereto the following:

Declaratory judgment shall enter in favor of the plaintiffs known as the Laurel Park Coalition pursuant to 42 U.S.C. § 9613 (g) (2), such that the defendants shall be liable for the following percentages of any response costs incurred and expended after September 9, 1998:

(a) Borough of Naugatuck: 4.29%
(b) Town of Orange: 3.63%
(c) Town of Seymour: 3.10%
(d) Town of Middlebury: 4.80%

[Endorsement] December 8, 2000. Granted. The judgment shall be amended to state the liability of the towns for response costs reasonably incurred after October 9, 1998 as follows: Naugatuck 4.29%; Orange 3.63%; Seymour 3.1%; Middlebury 4.8%.

"s/Peter C. Dorsey"
United States District Judge

FILED
JAN 5 10:31 AM '01
U.S. DISTRICT COURT
NEW HAVEN, CONN

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.F. GOODRICH	:	
V	:	CASE NO.
3:87CV00052 (PCD)		
	:	
HAROLD MURTHA, ET ALS	:	
CADBURY BEVERAGES, INC., ET ALS	:	
	:	
V	:	CASE NO. 3:95CV 01547 (PCD)
	:	
A.J. OSTER	:	

AMENDED JUDGMENT

On August 2, 2000, Judgment entered by this Court in the above-entitled cases. On August 11, 2000, the plaintiffs filed a Motion to Alter or Amend Judgment, requesting that the judgment be modified to read that judgment shall be amended to state the liability of the Towns for response costs reasonably concurred after October 9, 1998 as follows: Naugatuck 4.29%; Orange 3.63%; Seymour 3.1% and Middlebury 4.8%. On December 12, 2000, the court granted the plaintiffs' motion.

EOD: _____

Therefore, the original judgment entered on August 11, 2000 is amended to state the liability of the Towns for response costs reasonably concurred after October 9, 1998 as follow: Naugatuck 4.29%; Orange 3.6%; Seymour 3.1% and Middlebury 4.8%.

In all other respects the Judgment remains the same.

Dated at New Haven, Connecticut this 5th day of January, 2001.

KEVIN F. ROWE, CLERK
By

"s/Patricia A. Villano"
Patricia A. Villano
Deputy Clerk

FILED
JAN 10 2003
UNITED STATES COURT OF APPEALS SECOND CIRCUIT
ROSEANNE B. MACKECHNIE, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of January, two thousand three.

B.F. Goodrich, et al

V

Dkt No: 01-6014

Murtha, et al.

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellee-cross-appellant B.F.Goodrich Corp., et al

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: "s/Arthur M. Heller"
Arthur M. Heller,
Administrative Attorney

42 U.S.C. § 9607(a)

§ 107(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date.

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable

costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1954 [26 USCS §§ 9501 et seq.]. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

42 U.S.C. § 9613(f)

§ 113(f). Contribution.

(1) Contribution
Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement
A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United State or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the

State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

Fed. R. Civ. P. 53

FRCP 53. Masters.

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and

closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45. (3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may

serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) Application to Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

Supreme Court, U.S.
FILED
MAY 12 2003
OFFICE OF THE CLERK

No. 02-1485

IN THE

Supreme Court of the United States

TOWN OF MIDDLEBURY, CONNECTICUT, *et al.*,

Petitioners,

v.

GOODRICH CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Members of the Laurel Park Coalition:

Uniroyal Chemical Company, Inc. is a wholly-owned subsidiary of Crompton Corporation, a publicly held company.

Kerite Company is a wholly-owned subsidiary of Marmon Holdings, Inc. No publicly held company owns 10% or more of the company's stock.

Unisys Corporation has no parent company and no publicly held company owns 10% or more of the corporation's stock.

Risdon-AMS (USA), Inc. is a wholly-owned subsidiary of Crown Holdings, Inc., a publicly held company.

Cadbury Beverages, Inc. is a wholly-owned subsidiary of A&W Concentrate Company. A&W Concentrate Company is a wholly-owned subsidiary of A&W Brands, Inc. A&W Brands, Inc. is a wholly-owned subsidiary of CBI Holdings, Inc. CBI Holdings, Inc. is a wholly-owned subsidiary of Cadbury Schweppes Holdings, Inc. Cadbury Schweppes Holdings, Inc. is a wholly-owned subsidiary of Cadbury Schweppes Holdings, LLC. Cadbury Schweppes Holdings, LLC is owned by Cadbury Schweppes Investments BV, Bruton Lane Holdings, Inc. and Cadbury Schweppes Overseas Limited. Cadbury Schweppes Investments BV is a

wholly-owned subsidiary of Cadbury Schweppes Investments (Netherlands Antilles) NV. Cadbury Schweppes Investments (Netherlands-Antilles) NV is a wholly-owned subsidiary of Cadbury Schweppes Investments (Jersey) Limited. Cadbury Schweppes Investments (Jersey) Limited is a wholly-owned subsidiary of Cadbury Schweppes Overseas Limited. Cadbury Schweppes Overseas Limited is a wholly-owned subsidiary of Vantas International Limited. Vantas International Limited is a wholly-owned subsidiary of Cadbury Schweppes Public Limited Company.

Goodrich Corporation has no parent company and no publicly held company owns 10% or more of the corporation's stock.

Naugatuck Glass Co. is a wholly-owned subsidiary of Apogent Technologies, Inc. No publicly held company owns 10% or more of the company's stock.

Naugatuck Treatment Co. is a wholly-owned subsidiary of Uniroyal Chemical Company, Inc. No publicly held company owns 10% or more of the company's stock.

BP America, Inc. has no parent company and no publicly held company owns 10% or more of the corporation's stock.

Members of the Beacon Heights Coalition:

Uniroyal Chemical Company, Inc. is a wholly-owned subsidiary of Crompton Corporation, a publicly held company.

Goodrich Corporation has no parent company and no publicly held company owns 10% or more of its stock.

Reynolds Metals Company is a wholly-owned subsidiary of Alcoa, Inc. No publicly held company owns 10% or more of the company's stock.

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COUNTER-STATEMENT OF THE CASE

Respondents Laurel Park Coalition and Beacon Heights Coalition incurred response costs remediating two Superfund sites in Naugatuck and Beacon Falls, Connecticut. Pursuant to Section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9613(f), they asserted contribution claims against Petitioners based on Petitioners' disposal at the sites of significant amounts of municipal solid waste (MSW) containing CERCLA "hazardous substances."

Petitioners contended that no percentage of response costs should be allocated to them because their MSW contained low levels of hazardous substances. Following evidentiary hearings before a special master ("Master") appointed pursuant to Fed. R. Civ. P. 53, the United States District Court for the District of Connecticut ("District Court") rejected this position and allocated shares to the individual Petitioners. The United States Second Circuit Court of Appeals affirmed in pertinent part. *Goodrich Corp. v. Middlebury*, 311 F.3d 154 (2d Cir. 2002), Petitioners' Appendix ("Pet. App.") at 1a-40a.

Much of the case's history is set forth in Petitioners' "Statement of the Case," the Second Circuit's decision, and the District Court's two opinions, Pet. App. 41a-75a and 76a-91a. This Counter-Statement addresses aspects of the record and proceedings below that are crucial to the merits, but which Petitioners omit from their Statement of the Case.

A. The Actions of the District Court and Master

1. The District Court Reserved Allocation

Petitioners assert that the District Court "delegated the allocation task to a special master pursuant to Fed. R. Civ. P. 53," Petition ("Pet.") at 14. But as the Second Circuit held, this assertion is belied by the Order of Reference to the Master, Pet. App. 92a-95a.

> [I]n referring the case to the Master the district court clearly reserved to itself the power to allocate response costs among the parties according to the equitable factors *it*, not the Master, found appropriate to the case.
>
> The Master himself acknowledged this on several occasions. For example, he advised the parties that "the ultimate question to be decided in this case, under § 113[f], is almost unpredictable, except to the extent that you can judge what Judge Dorsey believes to be a reasonable set of equitable factors. . . ." Likewise, the Master stated "I don't decide what equitable factors are equitable factors. . . . [T]he statute places the broadest possible discretion in the hands of Judge Dorsey and not me. And the statute specifically says equitable factors that he deems to be appropriate, not that I deem to be appropriate." Thus, the Master understood what the Order of Reference made apparent: that the district court reserved the right to determine the appropriate equitable factors to apply, and the

> appropriate allocation of response costs among the parties . . . .

311 F.3d at 169, Pet. App. at 21a-22a (citations omitted). The Second Circuit rejected Petitioners' interpretation as a "loose reading . . . inconsistent with the Order's terms and even with the Master's understanding of his role in the case." 311 F.3d at 169, Pet. App. at 21a.

2. The Master Failed to Make Adequate Findings

Of the Master's Report, Petitioners state only that, "[i]n sum, based on the equitable factors he identified, the [Master] recommended that the district court allocate no remediation costs to the municipal defendants." Pet. at 5. This description fails to acknowledge that the Master neglected to address extensive evidence, much of it undisputed, on issues material to equitable allocation under CERCLA Section 113(f).

The evidence, as Petitioners acknowledge, was compiled "over a six-month period" and included extensive testimony and more than five hundred exhibits. Pet. at 5. The Report, *see* Pet. App. 96a-117a, is remarkable on its face for mentioning virtually none of this record.

Particularly glaring was the Report's omission of findings concerning the volume of waste disposed of by Petitioners. Because this case involved responsibility for waste disposal, much of the hearing record consisted of documentary and testimonial party-specific waste volume evidence. The Second Circuit characterized the Master's failure to address this evidence as "curious." 311 F.3d at 165, Pet. App. at 13a.

The Master also made no findings about Petitioners' own allocation evidence. As the Second Circuit explained, Petitioners presented "an alternative . . . allocation formula" which "allocated percentage shares of response costs" *to Petitioners* at the Laurel Park and Beacon Heights sites. *See* 311 F.3d at 164, Pet. App. at 11a. Petitioners effectively admitted, in other words, that *some* allocation should be made to them. The Master made no mention of this crucial admission. Nor did he acknowledge that the Petitioners' allocation witness agreed that "the amount of waste dumped at a landfill will affect the size and attendant cost of the cap." 311 F.3d at 164, Pet. App. at 12a.

The Master made only fragmentary findings as to the waste Respondents contributed to the sites. As the Second Circuit observed, he

> provided only scant details of the volume of waste dumped by the Coalitions, limiting his findings in this regard to the amount of waste dumped by [one] BHC member [Uniroyal] . . . at Beacon Heights from 1947 to 1976. For the better part of his Report, he did not differentiate between Beacon Heights and Laurel Park, and he spoke of the Coalitions and their wastes in general terms.

311 F.3d at 164, Pet. App. at 12a-13a.

The Master made no findings whatever on response actions or associated costs.

3. The District Court Supplemented the Master's Factual Findings

Petitioners state that the District Court rejected "very few" of the Special Master's findings. Pet. at 5. In fact, the District Court rejected none of the Master's genuine findings of fact. Rather, the District Court added factual findings on matters the Master failed to address. In its two opinions, Pet. App. 41a-75a and 76a-91a, the District Court undertook the conscientious, detailed consideration of the record that the Master failed to deliver. The only "findings" the District Court rejected were those premised, as discussed below, on errors of law.

The District Court made detailed findings as to the type and volume of waste disposed of by all parties, *see* Pet. App. 48a-50a (Laurel Park parties), *id.* at 45a-48a (Beacon Heights parties), allocation evidence and potential equitable allocation factors, *id.* at 63a-66a, and response costs, *id.* at 69a-74a. The District Court supplemented the Report's findings or provided critical qualifying details on other points as well, including the following:

- Petitioners' MSW contained CERCLA hazardous substances. Pet. App. 53a-54a.

- Even landfills used solely for disposal of MSW produce leachate containing CERCLA hazardous substances. Pet. App. 53a.

- Having found that Petitioners disposed of substantial volumes of MSW, the District Court noted that the extent of a landfill cap, and hence remediation cost, is partly a function of waste volume. Pet. App. 61a.

- The "greater bulk" of Uniroyal wastes "was comparable to MSW." Pet. App. 49a. The Master did not find otherwise.

- "The evidence does not permit the conclusion that HS [hazardous substances] from one or more particular waste streams caused or necessitated specific remediation." Pet. App. 55a. Petitioners thus failed to prove the CERCLA defense of divisible harm.

- Petitioners' own allocation evidence "suggest[ed] that some allocation [to petitioners] is appropriate." Pet. App. 63a.

- Remedial actions at the sites were consistent with the National Contingency Plan (NCP). Pet. App. 44a. Except to the extent expressly found otherwise, costs were also consistent with the NCP. *Id.* at 66a-73a.

Petitioners do not claim that the District Court's additional findings were erroneous.

4. The District Court Corrected the Master's Legal Errors

The District Court also corrected the Master on two central legal issues: the nature of proof necessary to sustain a contribution claim under CERCLA § 113(f), and the effect of classifying a given waste as "hazardous."

The Master had held Respondents to a burden of proving that Petitioners' wastes "incurred" (caused) specific remediation costs. This notion of party-specific cost causation

is a virtual *idée fixe* in the Report. *See, e.g.*, Pet. App. 106a (MSW does "not incur the costs to remediate the damage done by" Respondents' wastes); *id.* at 111a ("what particular waste of any single [Petitioner] incurred costs"). The Master treated cost causation as a *sine qua non* of § 113 contribution. *See id.* at 107a ("how could a court allocate costs to the disposal of a particular waste if there is no evidence . . . on how its disposal added to the costs . . . ?"), *id.* at 111a (noting lack of waste-specific cost linkage and purporting to "find" no basis on which to allocate any portion of costs to Petitioners). The Master ultimately treated this factor as dispositive: stating that petitioners' wastes "did not incur [cause] response costs," his Report concluded that "this finding disposes of all of the remaining claims of the . . . [Respondents] at Laurel Park." *Id.* at 114a.

Though couched as "findings," these statements followed from and depended on the legal view that waste-specific cost causation is necessary for § 113 allocation. The District Court reversed the Master on this pivotal issue, holding that contribution would not be precluded "for want of proof that a PRP's [hazardous substances] necessitated particular remediation and its attendant cost." Pet. App. 56a; *see also id.* at 57a (plaintiffs not obliged to prove that a particular defendant's hazardous substances caused incurrence of response costs). While acknowledging the appropriateness of considering whether costs to remediate MSW alone are "lesser included" costs of dealing with other wastes, the District Court expressly rejected, as a matter of law, the Master's decision to base his ultimate conclusion on this "finding," holding that the Master should not have treated it as determinative. *Id.* at 56a.

The District Court also rejected the Master's reliance on classification of waste under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"). The Master had referred repeatedly to such classification and restrictions on disposal of "hazardous waste" as contrasted with requirements for non-hazardous waste, *see, e.g.*, Pet. App. 104a-105a, 113a, and deemed RCRA listing the "most important equitable factor to be considered by the Court," *id.* at 117a. The District Court rejected this view categorically, holding not only that the "listing" of waste as "hazardous" is not controlling for purposes of CERCLA allocation, but that it is not even a proper equitable factor. *Id.* at 60a.

Petitioners do not contend that the District Court was incorrect on these legal issues.

B. Petitioners' Failure to Request Hearing

No party asked the District Court for an oral hearing on the Master's Report under Rule 53. Petitioners Hamden, Middlebury, New Haven, Orange and Westport made no request of any kind for a hearing. Petitioner Seymour noted "oral argument requested" on the first page of its "Application for Adoption of Report of Special Master with Modifications" (Mar. 31, 1999), but did so pursuant to a local rule that requires moving parties to state whether they request argument and provides that "the Judge may, in his or her discretion, deny such request." D. Conn. Loc. Civ. R. 7(a)(1) (formerly Loc. Civ. R. 9(a)(1)).

After the District Court issued its initial decision on objections to the Master's Report, Petitioners filed a "Memorandum in Support of [Their] Motion to Alter and Amend and for Reconsideration and Rehearing of Ruling on

Report of Special Master and Objections Thereto" (Oct. 13, 1999) ("Reconsideration Memorandum"). Petitioners again noted "Oral Argument Requested" on the first page of this document, again pursuant to the local rule and without reference to Rule 53. They argued for a hearing as follows:

> The municipalities believe that a rehearing limited to allocation, the municipalities' [waste] volumes, toxicity and other relevant equitable factors should be held. *Weeks of evidence* were presented on these issues before the Special Master in accordance with the Order of Reference. . . . No evidence was presented before the Court for its consideration and evaluation. Neither does the Court's Ruling refer to any of this evidence. Therefore, the Court should allow a *rehearing on allocation to review and evaluate first hand the evidence presented* before altering [sic] the facts found by the Special Master.

Reconsideration Memorandum, at 7-8 (emphasis added).

REASONS FOR DENYING THE WRIT

The Petition should be denied for three independent reasons. First, the standard of review of allocation by the District Court is defined in this case not by general CERCLA law, but by the Order of Reference. Second, even if the standard of review for CERCLA allocation were relevant, the courts of appeals do not employ conflicting standards. Third, Petitioners did not preserve their claim regarding hearings under Rule 53.

I.

THE ORDER OF REFERENCE DEFINES THE SCOPE OF DISTRICT COURT REVIEW OF THE SPECIAL MASTER'S REPORT

It is unnecessary to reach Petitioners' first question because under the Order of Reference, the District Court expressly reserved to itself the ultimate CERCLA § 113(f) allocation decision.

The District Court confirmed by its actions that it considered itself responsible for allocation. The Master himself endorsed this interpretation, repeatedly acknowledging that it was the District Court's role, not his, to make an allocation. The Second Circuit correctly relied on these statements as confirming the meaning apparent from the terms of the Order.

Petitioners offer no analytical or legal challenge to this interpretation. They occasionally imply that they take a different view, asserting for example that the District Court "delegated" allocation to the Master, Pet. at 14, and their summary of proceedings suggests some dissatisfaction with the Second Circuit's analysis, *see* Pet. at 10-11. In addressing the merits, however, *id.* at 13-20, they make no effort to marshal these hints into a systematic argument for a different interpretation, let alone a basis for concluding that the Second Circuit committed some error that would warrant review by certiorari.

Nor do Petitioners contend that the District Court could not frame the terms of reference so as to reserve the allocation decision to itself. Plainly it could. The rule expressly provides that an "order of reference . . . may specify or limit the

master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only." Fed. R. Civ. P. 53(c).

The District Court reserved responsibility for allocation under the Order of Reference. Interpretation of that Order presents no "compelling reasons" for review by certiorari, *see* Supreme Court Rule 10. It is therefore unnecessary to reach Petitioners' first question.

II.

THERE IS NO CONFLICT CONCERNING THE STANDARD OF REVIEW FOR CERCLA SECTION 113(f) ALLOCATION

Petitioners' first question presents the narrow issue of whether certiorari is warranted to resolve a conflict between the Second Circuit and two other Courts of Appeals. This "conflict" is illusory. In discussing this issue, Petitioners also assume that a district court has limited ability to review findings and conclusions of a special master. This assumption is incorrect under Rule 53.

A. The Circuits are Not in Conflict Regarding the Standard of Review of CERCLA Equitable Allocation Decisions.

Petitioners contend that equitable allocation of responsibility under CERCLA § 113(f) is treated as a "question of fact" in decisions of two Courts of Appeals, *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177 (9th Cir. 1999) and *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69 (1st Cir. 1999). In fact, however, these courts review allocation

essentially as the Second Circuit did in this case. They "conflict" only in how they describe their common approach.

CERCLA § 113(f) provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). District courts have broad equitable discretion to allocate costs under this provision. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998); *Environmental Transportation Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571 (6th Cir. 1991).

In *Boeing*, the Ninth Circuit explained that CERCLA § 113(f) "gives district courts discretion to decide what factors ought to be considered, as well as the duty to allocate costs according to those factors. We reverse only for an abuse of the discretion to select factors, or for clear error in the allocation according to those factors." 207 F.3d at 1187 (footnotes omitted). Contrary to Petitioners' characterization, the Ninth Circuit thus treats the overall allocation as a product of two distinct decisions, each with a distinct standard of review: first, the discretionary selection of relevant equitable factors, and second, the "allocation" that is the product of applying those factors to the facts found.

The Ninth Circuit followed exactly this approach in *Boeing*. The court first held that in deciding to allocate responsibility based on the volume of waste, the district court did not abuse its discretion to choose "factors appropriate in the particular case." *Id.* at 1188. The Ninth Circuit then affirmed the district court's factual finding that the ratio of the parties' volumetric contributions was 70:30, a finding

premised on crediting the defendant's evidence for that ratio rather than the plaintiff's evidence for a different ratio. *Id.* at 1187-88. In doing so, the Ninth Circuit used a familiar "clear error" rubric: "the 70:30 allocation was among the reasonable conclusions supported by the evidence." *Id.* at 1188.

Petitioners' position rests on the Ninth Circuit's statement that it reviewed "the district court's allocation as a finding of fact for clear error," *id.* But in context, it is clear that this statement refers not to the entire Section 113(f) equitable allocation process, but only to the portion of that process in which the equitable factors selected in the court's discretion are applied to relevant facts.

The First Circuit announced an identical standard of review in *Acushnet*, stating that the district judge's "equitable determinations would not be overturned unless he abused his discretion in some fashion, and any underlying findings of fact would be subject to [review for] clear error." 191 F.3d at 80 n.10. The district court had deemed quantity, toxicity and durability of the parties' hazardous materials "highly relevant to fixing an equitable share." *Id.* at 80. The First Circuit noted that the district court "referred to the equitable factors it found most salient," and interpreted the district court's decision as a "holding that, in light of the equitable factors he would apply should he make explicit findings, plaintiffs' evidence showed too little pollution to justify compelling defendants to take on any meaningful share of the response costs." *Id.* This standard and the resulting analysis correspond to those in *Boeing*.

The Second Circuit employed essentially the same approach here. It began with the general proposition that a district court's allocation of response costs will not be

disturbed absent an abuse of the broad discretion afforded by CERCLA § 113(f) to balance the equities. 311 F.3d at 168-69, Pet. App. at 20a (citing *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998)). It then explained what this meant:

> "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) *or a clearly erroneous factual finding*, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

311 F.3d at 169, Pet. App. at 20a-21a (emphasis added).

Though superficially different from the formulations used in *Boeing* and *Acushnet*, this explanation merely articulates the standard in terms of general abuse of discretion concepts. This is apparent from its citation to *Zervos*, a non-CERCLA case in which the Second Circuit systematically analyzed the nature and terms of *de novo*, clear error and abuse of discretion review, *see* 252 F.3d at 168-69. *Zervos* took particular pains with the latter, characterizing it as a "famously slippery" standard. *Id.* at 168 n.4. Neither *Boeing* nor *Acushnet* made any comparable effort to relate the CERCLA allocation review standard to general abuse of discretion principles. But in doing so, the Second Circuit here provided more detailed guidance that places the CERCLA analysis squarely in the mainstream of abuse of discretion doctrine. For example, in holding that "abuse" of discretion may consist of an error of law or a clear error of

fact, *Zervos* relied on Supreme Court precedent. *See* 252 F.3d at 169 & n.5 (citing *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)).

The Second Circuit's discussion of the record in this case confirms that its approach to review of CERCLA allocation decisions is substantively identical to those employed by the First and Ninth Circuits. It first held that the District Court's decision to allocate response costs according to the respective volume and toxicity of the parties' wastes did not "amount[] to an abuse of discretion." 311 F.3d at 172-73, Pet. App. at 28a-29a. For contentions turning on issues of fact, the Second Circuit then employed clear error analysis. *See, e.g.*, 311 F.3d at 172, Pet. App. at 26a-27a (waste volumes), *id.* at 172 n.17, Pet. App. at 28a n.17 (fate of hazardous substances in MSW).

The Second Circuit's approach is also evident from its opinion in *Bedford Affiliates*. There, the court also began with the general proposition that because CERCLA § 113(f) confers broad discretion on district courts, apportionment of cleanup costs will not be overturned "absent an abuse of . . . discretion." 156 F.3d at 429. It twice held that the district court's core decisions about allocation factors did not constitute abuse of that discretion. *See* 156 F.3d at 429 (defendant's active role in creating contamination warranted assigning it greater share); *id.* at 430 (plaintiff's inaction nevertheless justified assigning some share to it). The court then addressed factual contentions in terms of clear error analysis. For example, it rejected an argument based on a proffered inference that a pipe leak predated a defendant's possession of the property, noting that because the defendant "submitted no evidence to show that the pipe actually leaked . . . [before] he took possession, . . . it was not error" to find the defendant solely responsible for discharges from it. *Id.*

On another release theory, the Second Circuit affirmed the district court's conclusion as a "credibility finding" that was "not clearly erroneous." *Id.*

The Second Circuit's approach is thus essentially the same as those employed by *Boeing* and *Acushnet*. All three courts acknowledge that district courts enjoy broad statutory discretion to balance the equities to arrive at an allocation; all three review selection of equitable considerations for abuse of discretion and factual findings for clear error. The Second Circuit's analysis of this common approach in terms of general abuse of discretion standards does not amount to a substantive conflict.

Petitioners rely heavily on the Second Circuit's criticism of one aspect of the *Boeing* decision, *see* 311 F.3d at 170 n.16 (portion of Ninth Circuit's analysis "unpersuasive"), Pet. App. at 22a-23a. This comment focused, however, on Petitioners' citation of *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993) and *In Re Bell Petroleum Servs., Inc.*, 3 F.3d 889 (5th Cir. 1993). As the Second Circuit noted, those decisions involved the divisible harm defense under CERCLA § 107, 42 U.S.C. § 9607, under which "a potentially responsible party may avoid joint and several liability if it can prove the environmental harm at a site is divisible." 311 F.3d 170 n.16, Pet. App. at 22a-23a. As the Second Circuit explained, this kind of "apportionment" is a finding of fact guided by principles of causation, and hence "inapposite" to equitable allocation under Section 113(f). *Id.* Although Petitioners allude to *Alcan* and *Bell Petroleum*, *see* Pet. at 16, they do not suggest that the Second Circuit erred in distinguishing them on this basis.

In the same comment, the Second Circuit acknowledged language in *Boeing*, discussed above, suggesting that "allocation" is a question of fact. But the Second Circuit noted that the Ninth Circuit relied on *Alcan* and *Bell Petroleum* in this connection. Having concluded that those precedents were "inapposite" to § 113(f) allocation, the Second Circuit deemed *Boeing* "unpersuasive" to that extent. 311 F.3d at 170 n.16, Pet. App. at 23a.

This comment on *Boeing* does not alter the conclusion that there is no real conflict among these circuits on the question Petitioners present. The three courts do not otherwise take different approaches to review of allocation decisions. Indeed, in the same footnote, the Second Circuit cited the *Boeing* court's distinction between abuse of discretion review for selection of equitable factors and clear error review for "allocation according to those factors." 311 F.3d at 170 n.16, Pet. App. at 23a. At most, the Second Circuit's discussion of *Boeing* highlights an internal inconsistency in the Ninth Circuit's terminology.

The three decisions on which Petitioners rely are not "in conflict" to any meaningful extent. The standards of review they announce and employ are essentially equivalent, if not functionally identical. The differences among them are semantic at most and do not amount to conflicting views on "the same important question." Supreme Court Rule 10(a).

B. There is No Conflict Regarding the Standard of Review of CERCLA Allocation Decisions by District Courts Following Factfinding Before Special Masters under Rule 53.

Boeing and *Acushnet* address only appellate review of allocation by a district court acting as the fact finder in the first instance. They are of dubious relevance where, as here, a district court refers a case to a special master for fact finding. In such cases, the scope of review is largely a function of a Rule 53 analysis on which there is no conflict in authority.

In discussing their first question, Petitioners acknowledge this analysis indirectly by referring to two distinct Rule 53 issues. One is whether a district court, in deciding an objection to a Section 113(f) allocation recommended by a Rule 53 special master, applies the same standard of review applied by a court of appeals on appeal from a district court's Section 113(f) allocation decision. The other is how a court of appeals treats the master's and district court's decisions in a CERCLA allocation case involving a Rule 53 reference.

The Rule 53 analysis is critical to Petitioners' arguments about the CERCLA allocation standard of review because the purported conflict in authority relates only to appellate review of district court decisions. Petitioners therefore implicitly assume that district courts stand in the same relation to Rule 53 special masters as the courts of appeals stand to the district courts. Petitioners do not attempt to advance this proposition directly, however. Rather, they simply assert that the Master was "charged with the duty of identifying the appropriate equitable factors and applying

those factors to the facts," Pet. at 10, that the District Court "delegated" allocation to the Master, Pet. at 14, and finally that the district court's role in reviewing a master's report under Rule 53 is "analogous to that of an appellate court," Pet. at 18.

These assertions and the assumptions on which they rest are inconsistent with Rule 53(e)(2), which expressly provides that a district court "may adopt the report [of the master] or may modify it or may reject it in whole or part or may receive further evidence or may recommit it with instructions." Appellate courts have no such powers, particularly as to receiving additional evidence. In affording greater latitude to the district courts, Rule 53 reflects their ultimate responsibility as the forum of original jurisdiction under Article III: masters may assist the courts but can neither displace nor supplant them.

Petitioners also suggest that a district court cannot address matters on which the master makes no findings. *Cf.* Pet. at 18 (absent erroneous selection or application of allocation factors by master, court "obliged to adopt [his] determination"). They cite no authority for this argument, and the Second Circuit was not persuaded by it.

> We reject this contention as contrary to the Federal Rules of Civil Procedure, which expressly permit a district court to "modify" a special master's report. Fed. R. Civ. P. 53(e)(2); *cf. United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 603 (5th Cir. 1961) ("We do not think the power to modify [under Rule 53(e)(2)] is to be narrowly construed or applied. The power to

> modify is a power to alter or change, and to enlarge and add to as well as to limit, restrict or reduce.").

311 F.3d at 171, Pet. App. at 26a. This argument is a close relative of Petitioners' contention below that by failing to make findings about their waste disposal, the Master impliedly "found" that Respondents had failed to prove any such disposal — a contention the Second Circuit dismissed as "specious" in light of Petitioners' express admissions "that they each dumped a significant volume of MSW at one or, in some cases, both of the landfills." 311 F.3d at 171-72, Pet. App. at 26a. The notion that a district court is powerless to add findings under such circumstances is patently insupportable.

Petitioners also contend that the factual findings of a special master should be "directly reviewed" by a court of appeals. Pet. at 14. But there is no dispute on this point: the Second Circuit agreed that "we review a master's factual findings for clear error, whether or not the district court accepts them." 311 F.3d at 169, Pet. App. at 22a. Indeed, the Second Circuit expressly held one of the Master's findings clearly erroneous. *See* 311 F.3d at 172 n.17, Pet. App. at 28a n.17 (impermissible extrapolation from evidence re fate of hazardous substances in MSW). Petitioners make a superficially similar complaint that "the Second Circuit did not directly review the special master's *conclusions*." Pet. App. at 15 (emphasis added). But Petitioners cite no authority for the proposition that "conclusions" of Rule 53 masters, as opposed to findings of fact, are subject to direct review by the courts of appeals.

Petitioners do not challenge the Second Circuit's holding that under Rule 53, the District Court could make findings on matters the Master failed to address. Nor do they claim

that the District Court's added findings and legal conclusions were in any way in error. They thus have no principled basis to argue that the District Court lacked the ability, notwithstanding the Master's recommendation, to take the final step and allocate a share of response costs to Petitioners in light of the facts and law thus determined.

Against this background, the role of the court of appeals is self-evident: to assure that the district court acts within the scope of its authority under Rule 53. The Second Circuit performed exactly that role in this case.

The Rule 53 considerations here, absent from *Boeing* and *Acushnet*, validate the actions of the District Court and Second Circuit. On these issues, there is not even arguably a conflict that would warrant review by certiorari in this Court.

III.

PETITIONERS DID NOT PRESERVE THE CLAIM THAT A DISTRICT COURT MUST HOLD A HEARING ON AN OBJECTION TO A SPECIAL MASTER'S REPORT

Petitioners' second question relates to the lack of a hearing before the District Court on the Master's report. As a threshold matter, Petitioners concede that this question presents issues of first impression. *See* Pet. at 21. For this reason alone, it involves none of the "compelling reasons" that would justify a writ of certiorari, *see* Supreme Court Rule 10.

A. Petitioners Failed to Preserve Any Right to a Rule 53 Hearing

Petitioners contend that Rule 53(e)(2) mandates a hearing whenever any party objects to a report of a special master, apparently whether a hearing is requested or not. *See* Pet. at 22-23. The authorities they cite do not support this proposition, however, and do not suggest that any claimed hearing right is non-waiveable.

1. No Petitioner Objected to the Report

Petitioners do not claim that they objected to the Master's Report; indeed, they frame their question in terms of the rights of "non-objecting parties," Pet. at 21. They acknowledge that reported decisions address only the right of an objecting party to a hearing under Rule 53. *Id.* at 20-21. They cite no authority holding that a non-objecting party has a right to an oral hearing under Rule 53, and research discloses none.

2. No Petitioner Requested a Rule 53 Hearing

Even an objecting party must request a Rule 53 hearing before it has a right to be heard. *See Graves v. Runyon*, 46 F.3d 1133, 1995 WL 49084, at *2-3 (7th Cir. 1995) (unpublished opinion); *Green v. Brady*, 45 F.3d 439, 1995 WL 4282, at *2 (10th Cir. 1995) (unpublished opinion); *see also Parks v. State of Tennessee*, 881 F.2d 1077, 1989 WL 90792, at *1 (6th Cir. 1989); *cf. In re Chicago, St. Paul & Pac. R. Co.*, 739 F.2d 1169, 1171 (7th Cir. 1984) (hearing requested by motion).

No party made a request for a Rule 53 hearing. Without actually claiming otherwise, Petitioners allude to two

"argument requests" before the District Court.[1] The first was an "oral argument requested" notation on Petitioner Seymour's motion to adopt the Special Master's Report. *See* Pet. at 23. But this request was made, not under Rule 53, but pursuant to a local rule that requires movants to state whether they seek oral argument and expressly provides that "the Judge may, in his or her discretion, deny such request." D. Conn. Loc. Civ. R. 7(a)(1). Such a request therefore could not fail to leave the impression that the District Court had its usual discretion to deny the request. *Cf. United States v. Munger*, 216 F.3d 1074, 2000 WL 900205, at *1 (2d Cir. 2000) (unpublished opinion) (oral hearing not required by due process, or by state statute that provided for decision "after a hearing," where local rule gave court discretion whether to hold argument).

Petitioners also cite their request for a hearing on their motion for reconsideration of the District Court's decision rejecting the Master's conclusion. *See* Pet. at 23. But at that point, the issue before the District Court was whether to grant reconsideration of its initial decision on objections to the Master's Report. In that posture, the request for a hearing was neither presented under nor governed by Rule 53, and Petitioners did not contend that it was. Moreover, Petitioners sought not just a "hearing," but an opportunity to retry "weeks of evidence" on allocation. Petitioners cite no authority, under Rule 53 or otherwise, that would justify such a request. The District Court rightly rejected it as "inappropriate," Pet. App. at 87a.

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1. Petitioners' references to these requests contradict their concession at oral argument before the Second Circuit that they did not seek a hearing in the District Court on the Master's Report. *See* 311 F.3d at 179, Pet. App. at 39a. Respondents address these references on the merits in the text, but submit that Petitioners should be estopped from relying on them by their contrary representation to the Second Circuit on the same subject.

3. Petitioners Waived the Hearing Issue

Petitioners did nothing to alert the District Court to any claimed mandatory hearing rights under Rule 53. They addressed their "hearing requests" to the discretion of the District Court, mentioning neither Rule 53 nor the notion that a hearing was mandatory. The Second Circuit correctly held that by failing to raise the issue before the District Court, Petitioners waived the right to do so for the first time on appeal. *See* 311 F.3d at 179, Pet. App. at 39a-40a.

Even an objecting party can waive a right to a hearing. *See, e.g., Bio-Medicus, Inc. v. S'holders Comm. in Opp'n to Mgmt. of Bio-Medicus, Inc.*, 608 F.2d 1155, 1158 and n.6 (8th Cir. 1979) (objecting parties waived Rule 53 hearing); *Trout v. Garrett*, 780 F. Supp. 1396, 1402 n.10 (D.C. Cir. 1991) (same); *cf. In re Chicago*, 739 F.2d at 1171 (noting lack of waiver). Petitioners do not contend otherwise.

Petitioners cite three cases for the proposition that a hearing is mandatory regardless of whether anyone requests it. Only one, *Kieffer v. Sears, Roebuck & Co.*, 873 F.2d 954 (6th Cir. 1989), even addresses procedure on objections to reports of Rule 53 masters. But *Kieffer* involved a party that both objected and requested a hearing, and the court's comments on the hearing issue expressly deal with the rights of such a party. *See id.* at 955-56. Indeed, the court noted that it was not deciding whether it would reach the same decision in the absence of a hearing request. *See id.* at 956 n.3. *Kieffer* thus does not preclude waiver by an objecting party — let alone a non-objector — who fails to request a hearing.

The other two decisions cited by Petitioners shed no light on the question. *Southern Natural Gas Co. v. Land, Cullman County*, 197 F.3d 1368 (11th Cir. 1999), did not address whether Rule 53 objections require hearings. It merely related, in reciting the background of the appeal, that the district court held hearings on such objections. *Id.* at 1371. It did not endorse that procedure as a "better practice" or attempt to relate it to the rule, as Petitioners imply, *see* Pet. at 22.

In *Livas v. Teledyne Movible Offshore, Inc.*, 607 F.2d 118 (5th Cir. 1979) (per curiam), no party objected to the special master's report or requested a hearing. The district court adopted the report, however, before receiving the transcript of the hearing before the special master. The Fifth Circuit vacated and remanded, reasoning that the losing plaintiff's appeal was proper despite the lack of an objection because the district judge had an independent obligation under Rule 53 to review the master's findings for clear error, and could not have discharged that obligation without the transcript. *Id.* at 119. The relevance of this decision is unclear, as it does not address the hearing question under Rule 53 at all. Petitioners identify no comparable defect in the District Court's actions here that would excuse their failure to raise the hearing issue.

B. Petitioners Suffered No Harm from Lack of Hearing

The District Court's decision not to hold a hearing was, at most, harmless error. "No error . . . is grounds for granting a new trial or setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." Fed. R. Civ. P. 61.

The complaining party has the burden to show the error affected its substantial rights, *see Kotteakos v. United States*, 328 U.S. 750, 760 (1946). Harmless error analysis has been applied to failures to hold required hearings in other contexts, including those embracing constitutional rights. *See, e.g., United States v. Dhinsa*, 243 F.3d 635, 656 (2d Cir. 2001) (Confrontation Clause).

Petitioners suggest, citing *Kieffer*, that failure to hold a Rule 53 hearing can never be harmless error. *See* Pet. at 22. But as discussed above, *Kieffer* deals with the rights of parties that object and request a hearing. Petitioners here did neither.

Petitioners identify no adverse effect from the lack of a hearing apart from loss of the abstract opportunity to present their contentions orally. But the merits were exhaustively briefed before the District Court acted: in addition to the initial objections and applications for adoption of the Master's Report, voluminous briefs and rebuttal memoranda were filed over a period of roughly six months. Nothing about this process compromised Petitioners' ability to articulate their positions to the District Court.

Petitioners finally allude to due process concerns, Pet. at 23. But they had ample notice of challenges to the Master's Report and more than adequate opportunity to be heard, albeit in writing. Under these circumstances, the lack of an oral hearing has no due process dimension. The same is true of Petitioners' closing argument *ad absurdum* — that the procedure "condoned by the Second Circuit" will subject prevailing parties to loss of their judgments "without *any* opportunity to be heard by the district court." Pet. at 23 (emphasis added). The Second Circuit's decision poses no such danger because Petitioners by no means lacked "any opportunity" to present their views to the District Court.

CONCLUSION

The Petition presents none of the "compelling reasons" that would warrant review on a writ of certiorari. It should be denied.

Respectfully submitted,

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